

1983

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

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TAXATION ADMINISTRATION AMENDMENT BILL 1983

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EXPLANATORY MEMORANDUM

(Circulated by authority of the  
Minister for Housing and Construction and  
Minister Assisting the Treasurer,  
the Hon. Chris Hurford, M.P.)

General outline

This Bill will amend the law relating to the administration of taxation laws to -

- . authorise the Commissioner of Taxation to serve by ordinary mail a summons for an offence against a taxation law that on conviction is punishable only by a fine;
- . provide, where a defendant does not appear in court or enter a plea, for service of a notice of conviction and any fine payable following the conviction of the defendant for the offence in respect of which a summons was served by post;
- . allow, in such cases, at least 21 days from the date of service of the notice of conviction for payment of any fine imposed by the court on the basis of the postally served summons; and
- . provide, in such cases, that a person cannot be committed to gaol for non-payment of any fine imposed by the court unless that person has first been personally served with a notice warning that, unless either the fine is paid within 21 days of the service of the notice or a re-hearing of the matter is sought within that period, a warrant for commitment to goal may be issued.

### Main features

The Taxation Administration Amendment Bill 1983 will provide legislative authority for a uniform system throughout Australia of service by post of summonses issued out of courts of summary jurisdiction in respect of certain non-indictable offences under the taxation laws. Postal service of summonses under the proposed amendments will be limited to summonses in respect of offences for which the only available penalty is a pecuniary one.

Under the proposed system, a summons for the appearance before a court of summary jurisdiction of a person charged with an offence against the Taxation Administration Act or a taxation Act administered by the Commissioner of Taxation may be served by sending it by ordinary post to that person at his or her last known place of residence or business.

Safeguards are included in the system so as to protect a defendant who is served with a summons by post and who is dealt with by the court in his or her absence without entering a plea. An essential feature of the system is that a person who was not present at the hearing because the postally served summons was not received, either at all or in sufficient time to attend, or who did not receive or receive in sufficient time the notice of conviction (and the amount of the fine payable on conviction) will not have a warrant of commitment issued against him or her, or any other order enforced in default of payment of the fine, without some further action having been taken to notify the person of the details of the conviction.

In a case where a summons is served by post and the hearing occurs in the absence of a defendant who enters no plea, a period of at least 21 days from the date of the service of the notice of conviction is to be allowed for payment of any fine imposed by the court. If, after the expiration of that period, the fine remains unpaid and the defendant has not applied for a re-hearing on the ground that he or she did not receive, or receive in sufficient time, the summons, a further notice is to be served personally on the defendant before action to imprison the defendant for non-payment of the fine is taken. This further notice is intended to bring to the attention of the defendant the details of the notice of conviction previously issued and to warn that a warrant for commitment to prison may be issued at the end of 21 days from the date of service of the warning notice unless the person pays the fine or applies within 14 days for a re-hearing on the ground that he or she did not receive, either at all or in adequate time, the postally served summons and the notice of conviction.

The protection available to a defendant will be the right to apply to a court for the conviction to be set aside and the matter re-heard. This application may be made by the defendant either within 21 days of service of the notice of conviction or within 14 days of the personal service of the notice warning that a warrant for commitment may issue.

A more detailed explanation of the clauses of the Bill is contained in the notes that follow.

#### Clause 1: Short title, etc.

By sub-clause (1) of this clause the amending Act is to be cited as the Taxation Administration Amendment Act 1983.

Sub-clause (2) facilitates references to the Taxation Administration Act 1953 which, in this Bill, is referred to as "the Principal Act".

#### Clause 2: Commencement

By this clause, the amending Act will come into operation on the day on which it receives the Royal Assent. But for this clause, the amending Act would, by reason of sub-section 5(1A) of the Acts Interpretation Act 1901, come into operation on the twenty-eighth day after the date of the Royal Assent.

#### Clause 3: PART III - SERVICE OF TAXATION SUMMONSES

##### Introductory note

By this clause, it is proposed to insert a new Part - Part III - in the Principal Act. New Part III consisting of 8 new sections will introduce into the law authority for taxation summonses to be served by post and will specify the safeguards that are to apply where a taxation summons is so served.

When a person is to be charged with having committed an offence against a taxation law, the person is served with a summons to appear before a court which has jurisdiction to hear the charge. In States where summonses must be served personally on the person to whom it is directed this is at present done by an officer of the police force in that State, by a taxation officer or by a process server engaged for that purpose. New Part III - comprising sections 9 to 13C - will have the effect of putting in place a uniform system available throughout Australia for service of taxation summonses by post.

A detailed explanation of each of the sections in new Part III follows.

### Section 9: Interpretation

Section 9 contains definitions of a number of terms used in the proposed new Part III of the Principal Act -

"defendant" is defined as a person to whom a summons has been sent in accordance with section 10, a new section in the Principal Act which will authorise postal service of a taxation summons relating to a prescribed offence (an expression which is itself defined in this section). A person will satisfy the description "defendant" whether or not the summons is actually delivered to or received by the person;

"fine" is defined to include any pecuniary penalty;

"prescribed offence" is to mean an offence against the Principal Act or an offence against a taxation Act (a term later explained) such offence being specified in this definition as being one which is punishable only by imposition of a fine and not directly by a term of imprisonment. This definition is designed to ensure that the proposed postal service of summonses for taxation offences is limited to summonses in respect of offences for which the only available penalty is a pecuniary one;

"summons" means a writ or process notifying or directing a person to appear before a specified court on a day designated in the summons;

"taxation Act" is defined for the purpose of identifying Commonwealth taxation laws in relation to which this legislation will apply. A taxation Act is one of which the Commissioner of Taxation has the general administration. The Income Tax Assessment Act 1936 is the prime example.

### Section 10: Service of summons by post

This section is the key provision and provides the authority and mechanism for the service of a taxation summons by post under Commonwealth law.

Sub-section (1), authorises a summons requiring the attendance of a person before a court of summary

jurisdiction to answer a charge of committing an offence against a taxation Act, that on conviction is punishable otherwise than by direct imprisonment, to be served on the person by sending it by ordinary prepaid post. Courts of summary jurisdiction (an expression defined by paragraph 26(d) of the Acts Interpretation Act 1901) of the States and Territories have jurisdiction to hear charges under Commonwealth taxation Acts by virtue of section 39 of the Judiciary Act 1903 and provisions in those taxation Acts, e.g., sub-section 233(2) of the Income Tax Assessment Act 1936. A summons is to be served by posting it at least 21 days before the day on which the person to whom it is directed is required to appear before the court. The sub-section authorises the posting of the summons to the person at the address of either his or her last known place of residence or business.

Sub-section (1) is expressed to operate without prejudice to any other method of service provided for under any other law of the Commonwealth or under a law of a State or Territory. Moreover, sub-section 13C(1), which is explained later in these notes, provides that this Part will have effect in addition to, and not in derogation of, any other law of the Commonwealth or a State or Territory that makes provision for the service of summonses.

Sub-section (2) is a safeguarding provision that operates where the court has reason to believe that a person to whom a postally served summons was directed is not aware that a summons for appearance before the court has issued. The court will in these circumstances have the power to direct that the summons be re-served.

#### Section 11 : Notice of conviction ex parte

If a person receives a postally served summons and appears in court on the designated day in obedience to that summons he or she will be aware, through presence in the court, of the court's decision. However, there will be situations where the defendant will not be present at the proceedings before the court. Although a summons requires the person to whom it is directed to appear in court in answer to the charge, the courts of summary jurisdiction in the States and Territories have the power to proceed to hear a charge against a person in that person's absence and in the absence of a formal plea. Frequently persons charged in courts of summary jurisdiction with taxation offences choose not to appear in court when the charge is being heard. In some States and Territories procedures exist whereby a person may enter a plea in writing. These procedures are to apply to offences in respect of which a summons is postally served by reason of proposed sub-section 13C(2), which is explained later in this memorandum.

Where the defendant has entered a plea and the hearing proceeds in his or her absence according to the law of the State or Territory in which the court is located, the usual process of notification of the outcome of the hearing and execution of process will follow the relevant State or Territory law. However, if the defendant does not appear in court in obedience to the summons and has not entered a plea in relation to the charge, it is necessary for the person to be given notice of the outcome of the proceedings and to provide for the possibility that he or she may not have received the originating summons or, if received, it could not be complied with due to circumstances beyond the persons control which could not be brought to the court's attention.

Section 11 will therefore provide the authority for service of a notice to the defendant of the outcome of the proceedings and of the defendant's right to take further action where he or she is able to establish to the satisfaction of a court that a re-hearing on the grounds specified in proposed section 13A is warranted.

When the defendant does not attend the court in obedience to a postally served summons and he has not entered a plea, a court would, as explained earlier, normally proceed to hear the case ex parte. If the defendant is convicted of the offence in relation to which the summons was issued, an appropriate official of the court in which the proceedings took place is required, by sub-section (1), to arrange for the defendant to be served with a notice in writing containing details of the conviction, the order of the court, the amount of the fine imposed (if any) and the time allowed by the court for payment of the fine. This notice must also include advice about the defendant's right to apply under section 13A for an order setting aside the conviction.

Sub-section (2) authorises the notice referred to in sub-section (1) to be sent to the defendant by post in the same way that the original summons was sent. The date of service of a notice sent by post will be determined by reference to section 29 of the Acts Interpretation Act 1901 which provides, in effect, that service shall be deemed to have taken place (unless the contrary is able to be established) at the time at which the notice would be delivered in the ordinary course of the post. The time of service of the notice is relevant because a further notice under section 12 cannot be issued until 21 days have elapsed from service of the notice of conviction under section 11.

Section 12 : Notice of intention to issue warrant  
in default of payment

This section is a further safeguard which will operate to ensure that a defendant who was convicted in his or her absence without entering a plea will not be committed to prison for non-payment of a fine imposed by a court if the reason for failure to appear in court in obedience to the summons and failure to pay the fine arose from non-receipt of the postally served summons and the notice of conviction.

Section 12 requires that a notice warning of possible commitment to gaol, which notice is in the section referred to as a "personal notice", is to be personally served on a defendant who is a natural person. It is not, of course, possible to issue a warrant of commitment against a company. The personal warning notice is to be given to a defendant who has previously been served with a notice of conviction (paragraph (a)), has not paid the fine imposed by the court (paragraph (b)) and a period of at least 21 days has elapsed since the notice of conviction was served on the defendant (paragraph (c)). The obligation to arrange service of this personal notice is placed on the appropriate official of the court in which the conviction was recorded.

The notice served under this section is designed to inform the defendant that, unless he or she either pays the fine in full (paragraph (d)) or applies for a re-hearing (paragraph (e)), a warrant for commitment to prison may be issued. A defendant who, in response to this personal notice, wishes to avoid the consequences of the issue of a warrant of commitment must pay the fine in full within 21 days after the personal notice has been served or apply to the court within 14 days after service of the personal notice in accordance with section 13A for the conviction to be set aside and the matter re-heard.

The personal service of the warning notice is an essential feature of the proposed Commonwealth system and is the main safeguard to ensure that a person who was not present at the hearing because he or she did not receive the postally served summons either at all or in sufficient time to attend or who did not receive or receive in sufficient time the notice of conviction will not be able to be imprisoned in default of payment of the fine without personal notification of the details of the conviction and the right to have the conviction set aside and the matter re-heard.



Section 13 : Limitation of action to enforce  
payment of fine

Section 13 is designed to prevent the issue of a warrant of commitment or the taking of other action for enforcement of a fine imposed by the court until certain conditions have been met. It forms part of the system of essential safeguards which will operate to protect a defendant who did not enter a plea in respect of the offence to which a postally served summons relates and who was convicted by the court in his or her absence. Section 13 specifies the conditions which must be satisfied before a warrant of commitment may be issued and executed or other enforcement action taken.

The effect of this section is that, where a defendant who has not entered a plea is convicted in his or her absence and a fine has been imposed, the conditions specified in paragraphs (a) and (b) must be satisfied before action to enforce the court's decision can proceed. Paragraph (a) provides that a warrant for commitment of the defendant to prison for failure to pay the fine cannot be issued unless a warning notice under section 12 has first been personally served on the person and a period of not less than 21 days has elapsed since the date on which that notice was served. A section 12 warning notice must be preceded by a section 11 notice of conviction. Accordingly, a person who is convicted in his or her absence without entering a plea will not be liable to be imprisoned for non-payment of a fine for a taxation offence until at least two notices of the conviction have been served and 42 days have elapsed since the date of the conviction. In addition the person will have been afforded two opportunities to apply for the setting aside of the conviction and re-hearing of the case. Paragraph (b) imposes conditions in relation to other methods of enforcement of fines. Under that paragraph the notice of conviction referred to in sub-section 11(1) (which informs the defendant of certain rights that are available) must have been sent to the defendant and a period of not less than 21 days have elapsed before any action (other than a warrant of commitment) is taken to enforce payment of any fine imposed by the court.

Section 13A : Setting aside of conviction or order

As explained earlier in the memorandum protection is to be available to a defendant who, because he did not receive a postally served summons or did not receive it in sufficient time to comply with it, did not appear in court in answer to the summons or enter a plea. Protection is also to be available where such a defendant did not receive notice of conviction.

Section 13A specifies the circumstances in which the protection may be sought and the relief available to the defendant.

Sub-section (1) applies where a notice of conviction has been served on a defendant convicted in his or her absence without entering a plea. Where a fine has been imposed by the court, the defendant, in accordance with paragraph (a), may before the longer of the expiration of the period allowed by the court for payment of the fine or before the expiration of a period of 21 days after the date of service of the notice of conviction apply in writing to the court which convicted the defendant or another court of summary jurisdiction which has jurisdiction to hear charges for taxation offences for an order setting aside the conviction or order. Where a fine was not imposed, the defendant is given, by paragraph (b), a period of 21 days in which to apply to have the conviction or order set aside. The facility to apply to any competent court of summary jurisdiction ensures that a defendant who has moved away from the district in which the original proceedings took place is not required to return to that district to make application for re-hearing and to appear before it to establish the grounds in support of his or her application.

Sub-section (2) operates where the personal warning notice required by section 12 has been served on a defendant. The defendant is given the right to apply to the court within 14 days of the date of service of that notice to have the conviction or order set aside. The defendant may also apply to another court of summary jurisdiction that would have had jurisdiction to make the conviction or order.

Sub-section (3) provides that all persons who were a party to the original proceedings are to be parties to the application to have the decision arising out of those proceedings set aside. This will ensure that the informant in the original proceedings will be a party to the re-hearing application and will be able to draw to the court's attention any matters relevant to the application for re-hearing. This will ensure that all parties will be aware of the application for re-hearing and, of particular importance, that the court which recorded the conviction will be notified so that any action in course to enforce payment of the fine will be suspended.

The circumstances in which the court to which a re-hearing application is made is required to set aside the conviction or order in response to the application under either sub-sections (1) or (2) are set out in sub-section (4).

If the defendant applies under sub-section (1) in response to notice of the conviction under section 11 he or she must, in accordance with sub-paragraph (a) (i), satisfy the court that the postally served summons to appear before the court was not received or that it was not received in sufficient time to enable attendance at the proceedings. Alternatively, under sub-paragraph (a) (ii), where the defendant failed to attend the proceedings at which the conviction was recorded, the court has a discretion to grant the application if, in the opinion of the court, there are reasons which make it desirable in the interests of justice, for the conviction or order to be set aside and the matter re-heard.

If the defendant's application is made under sub-section (2) as a consequence of a personally served warning notice as required by section 12, the grounds available to the defendant for making the application are set out in paragraph (b) of sub-section (4). Alternative grounds are specified. The first condition (sub-paragraph (i)) is that the defendant must satisfy the court that the postally served summons was not received at all or in sufficient time to enable attendance at the proceedings and the section 11 notice of conviction not received at all or in sufficient time to enable an application under sub-section 13A(1) to be made within the time limit specified for making such application. The second condition (sub-paragraph (ii)) gives the court a discretion to grant the application if, in the opinion of the court, there are reasons which make it desirable in the interests of justice, for the conviction or order to be set aside and the matter re-heard.

If the court is satisfied that the defendant's grounds for making the application in sub-section (1) or (2) are made out, the court is required to set aside the conviction or order and either proceed forthwith to re-hear and determine the matter (paragraph (c)) or adjourn the re-hearing proceedings to a suitable time and place (paragraph (d)).

Under sub-section (5) the appropriate official of the court in which the application for re-hearing is made is required to notify the other parties to the application (refer sub-section (3)) and the original court, if the application is made to a court other than the original court, of the making of the application.

Sub-section (6) operates to ensure that, when a court sets aside the conviction or order that was made by another court, that other court must forthwith be notified that the conviction or order was set aside thus ensuring that action to enforce the original conviction is not proceeded with.

Section 13B : Proof of service of summons or notice

Section 13B specifies the method by which service of a summons, a notice of conviction or a warning notice is to be proved.

The service of a summons under section 10, a notice of conviction under section 11 or a personal notice under section 12 may be proved by the oath of the person who served it or by affidavit or by other means provided for under relevant court procedures.

Section 13C : Application of other laws

The provisions contained in the bill when inserted in the Principal Act are intended to provide a system to be used for serving summonses for certain offences against Commonwealth taxation laws. The Commonwealth system will, however, operate in tandem with existing laws already in operation in a State or Territory.

Sub-section (1) has the effect that, with respect to any provisions relating to the service of summonses, the Commonwealth law expressed in this Part will operate in addition, to and not in derogation of, any other law of the Commonwealth or the law of a State or Territory. The Commonwealth law will not therefore override any particular State or Territory law dealing with the service of summonses.

Sub-section (2) is designed to enable the Commonwealth system to operate in the context of a State or Territory procedure under which a person who has been served with a summons wishes to enter a plea without having to attend the court. Section 79 of the Judiciary Act 1903 provides that the laws of each State or Territory (including laws relating to court procedure) apply where State or Territory courts are exercising federal jurisdiction. Were it not for sub-section (2), the provisions of the law of a State or Territory which authorise ex parte proceedings to be conducted under a system in which the defendant is entitled to give notice in writing of his plea without attending the court may not apply to proceedings initiated by a summons served under the proposed Commonwealth system. Sub-section (2) gives the necessary authority for the application of these provisions in relation to an ex parte hearing when summonses are issued under the provisions of this Part