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LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL
2002

EXPLANATORY MEMORANDUM

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Attorney General
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Outline

The Justice and Community Safety Legislation Amendment Bill 2002 (the Bill) amends a number of laws administered by the ACT Department of Justice and Community Safety. The laws amended include the *Pawnbrokers Act 1902*, *Crown Proceedings Act 1992*, *Legal Practitioners Act 1970*, *Second-hand Dealers Act 1906* and the *Agents Act 1968* and legislation regulating the Public Trustee and consequential amendments as a result of the GST. The proposed amendments are detailed below.

The amendments to the *Pawnbrokers Act 1902* transfer the licensing function from the Magistrates Court to the ACT Office of Fair Trading.

The amendments to the *Crown Proceedings Act 1992* change the way judgments on the Crown are to be served and paid. Under the amendments, notices of judgment are only to be served on the Treasurer if the judgment has not been paid within 21 days and there has been no appeal or stay. If the judgment is served on the Treasurer, then the Treasurer must direct how the money is to be paid, unless s/he is satisfied that the judgment has or can be satisfied by some other means.

The amendments to the *Legal Practitioners Act 1970* allow the Statutory Interest Account to be used by the Law Society in assisting in applications for admission or enrolment and regulatory action. In addition, the amendments will bar claims on the Fidelity Fund from solicitors who also engage in a mortgage practice.

The amendments to the *Second-hand Dealers Act 1906* correct minor inconsistencies and omissions identified in drafting the regulations under this Act. Primarily, the amendments provide a specific power to exempt persons or organisations, such as charities from requiring a second-hand dealer's licence. In addition, the amendments permit second-hand dealers to ask buyers and sellers to show identification, so that the dealer can comply with their record-keeping requirements under the Act.

The Bill amends a range of Acts to ensure that the management of Territory trust moneys complies with section 51 of the *Financial Management Act 1996* and to allow for the effective management of Territory trust moneys and unclaimed money by the Public Trustee in accordance with "prudent person" principles.

The amendments to the *Administration and Probate Act 1929* and the *Consumer Credit (Administration) Act 1996* provide that GST may be charged on the cost of administering an estate or on the commission for a finance broking transaction.

The amendments to the *Agents Act 1968* amend the conflict of interest provisions of the Act.

The amendments to the *Children and Young People Act 1999* allow other magistrates to hear Childrens Court matters if the Childrens Court Magistrate is sitting. This

amendment will ensure that the Childrens Court works more efficiently, without long delays, and is more responsive to the needs of children.
The Bill also includes a number of technical amendments to the above Acts.
Explanatory notes on these amendments have been included in the Bill.

Financial Implications

Nil.

Clause Notes

Clause 1 – Name of Act – states the title of the Act, which is the *Justice and Community Safety Legislation Amendment Act 2002*.

Clause 2 – Commencement – states when the Act commences. The amendments to the *Administration and Probate Act 1929*, *Children and Young People Act 1999*, *Legal Practitioners 1970* and the *Consumer Credit (Administration) Act 1996* commence on the day after notification. The remaining amendments commence 28 days after notification.

Clause 3 – Act amended – pt 2 – provides that this part amends the *Administration and Probate Act 1929*.

Clause 4 – Executors etc may be allowed commission Section 70(2) – amends the *Administration and Probate Act 1929* to permit the GST to be charged on a commission.

Clause 5 – Limits of professional charges for obtaining probate etc Section 71(3) – amends the *Administration and Probate Act 1929* to set out the amounts that can be paid out of an estate, including GST.

Clause 6 – Act amended – pt 3 - provides that this part amends the *Agents Act 1968*.

Clause 7 – Sections 12, 13 and 14 – substitutes sections 12, 13 and 14 with a new section 12 dealing with the ending of member’s appointments.

Clause 8 – Meetings of the board Section 16(8) – omits section 16(8) of the *Agents Act 1968* dealing with conflicts of interest, as this is now covered in section 16A.

Clause 9 – New Section 16A – sets up a new regime for members of the Agents Board to disclose their interests. The new regime requires disclosure of interests, recording the disclosure of interests in the Board’s minutes and that a copy of the disclosures made in any financial year must be given to the Minister and then to the relevant committee of the Legislative Assembly.

Clause 10 – Duties of board in relation to unclaimed moneys in trust Section 57D – replaces the “registrar-general” with the “public trustee”, as the person responsible for managing unclaimed money under the *Agents Act 1968*.

Clause 11 – Application to recover moneys Section 57E – replaces the “registrar-general” with the “public trustee”, as the person responsible for managing unclaimed money under the *Agents Act 1968*.

Clause 12 – Determination of applications Section 57F – replaces the “registrar-general” with the “public trustee”, as the person responsible for managing unclaimed money under the *Agents Act 1968*.

Clause 13 – Act amended – pt 4 – provides that the Act amended is the *Children and Young People Act 1999*.

Clause 14 – Sections 52 and 53 – provides that the Chief Magistrate may make arrangements about the appointment of the Childrens Court Magistrate and the assignment of magistrates under sections 51 and proposed 53A.

Proposed section 53 provides that the Magistrates Court is known as the Childrens Court when it is constituted by the Childrens Court Magistrate exercising the jurisdiction given under section 54 of the Act. It also establishes the principle that the Childrens Court Magistrate is responsible for dealing with all matters within the jurisdiction of the Childrens Court.

Proposed section 53A provides that, notwithstanding proposed section 53(2), there are limited circumstances in which other magistrates may hear Childrens Court matters. Before assigning a matter, in those limited circumstances, under proposed section 53A(2), the Chief Magistrate will have to be satisfied that the assignment is necessary having regard to the matters set out in subsection (3). The matters set out in subsection (3)(a) to (c) reflect relevant general principles contained in the Act, namely the best interests principle in section 12(1)(a) and the principles set out in section 12(2)(d). The Chief Magistrate is also required to consider the views of the Childrens Court Magistrate on the proposed assignment.

Proposed sections 53A (5) and (6) ensure that the decision to assign or not assign a matter is not subject to court challenge. The provisions do not affect the usual rights of parties in relation to the magistrate who has been assigned – for example, a party may still ask the magistrate to disqualify himself or herself if there is a conflict of interest.

Proposed section 53A(7) makes it clear that the section does not limit the ability of the Chief Magistrate to assign an acting Childrens Court Magistrate under section 51.

Clause 15 – Act amended – pt 5 – provides that the Act amended is the *Consumer Credit (Administration) Act 1996*.

Clause 16 – Commissions Section 35(2) – amends the *Consumer Credit (Administration) Act 1996* to permit the GST to be charged on a commission.

Clause 17 – Act amended – pt 6 – provides that the Act amended is the *Crown Proceedings Act 1992*.

Clause 18 – Section 13 – replaces section 13 of the *Crown Proceedings Act 1992*. The new section 13 provides that the party in whose favour the judgment was given may give a copy of a final judgment against the Crown to the Treasurer. A judgment may only be given to the Treasurer where the judgment has not been paid, has not been appealed or stayed and at least 21 days have elapsed since the judgment was given. If the Treasurer receives a judgment he/she must give directions as to how the judgment is to be paid, unless the judgment can or has been paid in another way. A direction under this section is sufficient to authorise the payment of Territory money.

Section 13A provides that if an ACT court issues a final judgment against the Crown of another State or Territory then the court must transmit a copy of the judgment to that jurisdiction's Governor or Administrator.

Clause 19 – Dictionary, new notes – inserts a new note into the dictionary regarding the *Legislation Act 2001*.

Clause 20 – Act amended – pt 7 – provides that the Act amended is the *Legal Practitioners Act 1970*.

Clause 21 – Issue of certificates – generally Section 26, new note – provides that a new note is inserted into section 26 of the *Legal Practitioners Act 1970*, identifying that new section 147H(1) also contains restrictions on the issue of practising certificates.

Clause 22 – Suspension Section 36, new note – provides that a new note is inserted into section 36 of the *Legal Practitioners Act 1970*, identifying that new section 147H(2) also contains provisions allowing the suspension of practising certificates.

Clause 23 – Statutory interest account Section 128(4)(d) and (e) – provides that the Statutory interest account can be used to reimburse the Law Society in a number of circumstances. The circumstances include where there has been an inquiry before the professional conduct board, action taken before the court relating to a legal practitioner or an unqualified person practising as a legal practitioner, objecting to an application for admission or enrolment or assisting the court in relation to such an application.

Clause 24 – Interstate legal practitioner may practice in this jurisdiction Section 191D(2), note – provides that two new notes are inserted into section 191D of the *Legal Practitioners Act 1970*, drawing attention to the *Legislation Act 2001* and new obligations under section 147H(3).

Clause 25 – New Part 12A – inserts new Part 12A into the *Legal Practitioners Act 1970*. The new Part 12A regulates mortgage practices and management investment schemes.

New section 147A inserts definitions into the part relevant to the regulation of mortgage practices and managed investment schemes.

New section 147B provides that a solicitor must not, in their capacity as solicitor for either the lender or contributor, negotiate a regulated mortgage. This exclusion does not apply if the mortgage is a Territory regulated mortgage, a run-out mortgage or is part of a managed investment scheme operated by a responsible entity.

New section 147C provides that a solicitor can, by giving notice to the Law Society, nominate their practice as a Territory regulated mortgage, thereby avoiding the exclusion in new section 147B.

New section 147D provides an offence of failing to give the Law Society notice of the negotiation of the making of or acting in relation to Territory regulated mortgages.

New section 147E provides a requirement for solicitors working on regulated mortgages to have fidelity insurance. A failure to have insurance is an offence.

New section 147F limits the claims that can be made against the fidelity fund in relation to regulated mortgage.

New section 147G provides that a solicitor for a regulated mortgage must give their client written notice of the fact that section 147F limits the claims of the fidelity fund and must give their client information regarding their fidelity insurance under section 147E.

New section 147H provides that the Law Society can suspend or not issue a practising certificate where the solicitor has not complied with the requirement to take out fidelity insurance.

New section 147I provides that this part does not limit the ability of a solicitor to carry out legal work for a managed investment scheme.

New section 147J bars claims against the fidelity fund for loss arising under section 147I.

New section 147K provides that a solicitor cannot transfer a mortgage under this part to a responsible entity, unless the lender or contributor has consented to the transfer.

New section 147L provides that the Law Society can request information from a solicitor regarding a regulated mortgage.

New section 147M clarifies that this part does not effect any professional indemnity insurance policy under section 76 of the *Legal Practitioners Act 1970*.

New section 147N provides that the Minister can approve forms for the purposes of this part.

New section 147O provides that the regulations and the rules of court may deal with the matters prescribed in this part.

New Division 12A.5 (sections 147P-147V) provides transitional arrangements for pre-existing mortgages.

Clause 26 – Act amended – pt 8 – provides that the Act amended is the *Legislation Act 2001*.

Clause 27 – Dictionary, part 1, new definition of GST – inserts a definition of “GST” in the *Legislation Act 2001*.

Clause 28 – Act amended – pt 9 – provides that the Act amended is the *Pawnbrokers Act 1902*.

Clause 29 – Part 2 – substitutes Part 2 of the *Pawnbrokers Act 1902* with a new part dealing with licensing. The new part provides for the issue of pawnbroker’s licences by the Commissioner for Fair Trading, rather than the Magistrates Court. This part provides that only a suitable person can be licensed as a pawnbroker.

Clause 30 – Part 3, new section 8 heading – inserts a new heading in the *Pawnbrokers Act 1902*.

Clause 31 – New section 8(1) – provides that a pawnbroker must only carry on business at the premises stated in their licence, although the licence may list more than one premises. Previously a pawnbroker was required to have a separate licence for each premises where business was to be conducted.

Clause 32 – Part 4, new sections 21-25 – inserts new section 21 which specifies the test to be used in working out whether a person is a suitable person to be issued a pawnbroker’s licence. A person is suitable if they are not disqualified. A person is disqualified if they have committed an offence under this Act or a corresponding law, an offence involving fraud or dishonesty or have been refused a pawnbroker’s licence. The Magistrates Court may declare that a person is suitable, if satisfied that they are unlikely to be disqualified again.

New section 22 provides that the Magistrates Court may cancel a pawnbroker’s licence if the person is not suitable.

New section 23 requires the Commissioner for Fair Trading to keep a register of licences under the *Pawnbrokers Act 1902*, which is available for public inspection.

New section 24 provides the information that may be included on the register under section 23 and states that the Commissioner for Fair Trading may correct any mistakes or omissions on the register.

New section 25 provides an offence for providing false or misleading information in an application for a pawnbroker’s licence. The section also provides an offence for omitting information that makes the application misleading in a material particular.

Clause 33 – Section 47 – inserts new sections 27 to 29 into the *Pawnbrokers Act 1902*. Sections 27 and 28 provide that the Minister may by disallowable instrument

determine fees and charges for the Act and that the Commissioner for Fair Trading can approve forms for the Act.

Section 29 provides that the Executive may make regulations under the Act.

Clause 34 – new part 5 – inserts a new part into the *Pawnbrokers Act 1902* dealing with transition from the old licensing system to the new licensing system. Part 5 determines that any application for a licence not finally dealt with by the Magistrates Court is deemed to be a licence under the new licensing provisions.

Clause 35 – Act amended – pt 10 – provides that the Act amended is the *Public Trustee Act 1985*.

Clause 36 – Section 47 – provides that the function of the Public Trustee Investment Board is to advise the Public Trustee on the investment of money, rather than directing the Public Trustee on the investment of money.

Clause 37 – Section 48 – clarifies that the Public Trustee Investment Board can have more than the three members currently permitted under this section. This section also removes a number of provisions that are covered by the *Legislation Act 2001*, and inserts notes referring to specific provisions of the *Legislation Act 2001*.

Clause 38 – Meetings of board Section 54(4) – gives effect to the amendment in clause 37, which provides for more than three members to be appointed to the Public Trustee Investment Board.

Clause 39 – Investment of money held in common funds Section 56(1) – gives effect to the amendment in clause 36 that changes the function of the Public Trustee Investment Board from directing to advising the Public Trustee on the investment of money.

Clause 40 – Investment of money not held in common funds Section 57(b) – gives effect to the amendment in clause 36 that changes the function of the Public Trustee Investment Board from directing to advising the Public Trustee on the investment of money.

Clause 41 – Withdrawal of money from common funds Section 58(1)(b) – gives effect to the amendment in clause 36 that changes the function of the Public Trustee Investment Board from directing to advising the Public Trustee on the investment of money.

Clause 42 – Section 59 – gives effect to the amendment in clause 36 that changes the function of the Public Trustee Investment Board from directing to advising the Public Trustee on the investment of money.

Clause 43 – Income accounts Section 60(4) – gives effect to the amendment in clause 36 that changes the function of the Public Trustee Investment Board from directing to advising the Public Trustee on the investment of money.

Clause 44 – New section 60(4A) – gives effect to the amendment in clause 36 that changes the function of the Public Trustee Investment Board from directing to advising the Public Trustee on the investment of money.

Clause 45 – Section 60 – provides that the subsections in section 60 are to be renumbered when the Act is next republished.

Clause 46 – Common fund guarantee and reserve account Section 61(3) – gives effect to the amendment in clause 36 that changes the function of the Public Trustee Investment Board from directing to advising the Public Trustee on the investment of money.

Clause 47 – Section 61(5) – gives effect to the amendment in clause 36 that changes the function of the Public Trustee Investment Board from directing to advising the Public Trustee on the investment of money.

Clause 48 – Section 61(6) – gives effect to the amendment in clause 36 that changes the function of the Public Trustee Investment Board from directing to advising the Public Trustee on the investment of money.

Clause 49 – Directions of board about investments Section 62 – gives effect to the amendment in clause 36 that changes the function of the Public Trustee Investment Board from directing to advising the Public Trustee on the investment of money.

Clause 50 – Section 63 – gives effect to the amendment in clause 36 that changes the function of the Public Trustee Investment Board from directing to advising the Public Trustee on the investment of money.

Clause 51 – Advances from common funds Section 64(1) – gives effect to the amendment in clause 36 that changes the function of the Public Trustee Investment Board from directing to advising the Public Trustee on the investment of money.

Clause 52 – Section 64(2) – gives effect to the amendment in clause 36 that changes the function of the Public Trustee Investment Board from directing to advising the Public Trustee on the investment of money.

Clause 53 – Advances to beneficiaries Section 65(2) – gives effect to the amendment in clause 36 that changes the function of the Public Trustee Investment Board from directing to advising the Public Trustee on the investment of money.

Clause 54 – Section 65(3) – gives effect to the amendment in clause 36 that changes the function of the Public Trustee Investment Board from directing to advising the Public Trustee on the investment of money.

Clause 55 – Act amended – pt 11 - provides that the Act amended is the *Residential Tenancies Act 1997*.

Clause 56 – Interest Section 28(3) – provides a definition of interest.

Clause 57 – Act amended – pt 12 - provides that the Act amended is the *Second-hand Dealers Act 1906*.

Clause 58 – Dealers must be licensed Section 4 – provides for an additional subsection to be inserted in section 4 of the *Second-hand Dealers Act 1906*.

Clause 59 – New section 4(2) – inserts a new section 4(2), which provides that the Regulations may exempt an entity from the requirement to be licensed.

Clause 60 – Dealers – carrying on business New section 10(2) – provides that a licensed second-hand dealer does not commit an offence because the dealer buys goods at a place other than the premises stated in the licence.

Clause 61 – New section 16A – provides that a licensed second-hand dealer may ask a person to show identification to enable the dealer to comply with section 6(1) of the Act or when selling goods if the dealer believes that the details given by the buyer are incorrect.

Clause 62 – Dictionary, definition of second-hand dealer – excludes people in the business of hiring out second-hand goods from the requirement to be licensed as a second-hand dealer.

Clause 63 – Regulations amended – pt 13 - provides that the Regulations amended are the *Second-hand Dealers Regulations 2002*.

Clause 64 – Kinds of second-hand goods – Act, dict, def of second-hand goods Regulation 5(2) and (3) – removes regulations 5(2) and (3) which sets out goods that are not second-hand goods for the purposes of the Act. Instead these items are included in new regulation 5A.

Clause 65 – New regulation 5A – replaces regulations 5(2) and 5(3) by setting out entities that are exempt from the requirement to be licensed, rather than excluding goods sold by these entities from the definition of “second-hand goods”.

Clause 66 – Making records about goods bought or received – Act, s 6(1) Regulation 8(1) – replaces existing regulation 8(1) by excluding goods received from an exempt entity.

Clause 67 – Making records about goods sold or disposed of – Act, s 6(1) Regulation 9(1)(a) – substitutes “licensed second-hand dealer” with “second-hand dealer” to clarify that only licensed second-hand dealers are obliged to keep records of goods sold or disposed of.

Clause 68 – Regulation 10 heading – substitutes the heading for regulation 10 to give effect to new regulation 5A dealing with exempt entities.

Clause 69 – Regulation 10(1)(a) – substitutes regulation 10(a) to give effect to new regulation 5A dealing with exempt entities.

Clause 70 – Dictionary, new definition of exempt entity – inserts a definition of “exempt entity”.

Clause 71 – Act amended – pt 14 - provides that the Act amended is the *Unclaimed Moneys Act 1950*.

Clause 72 – Unclaimed assets in hands of liquidator Section 4 – substitutes the public trustee for the registrar-general as the person responsible for unclaimed money in the *Unclaimed Moneys Act 1950*.

Clause 73 – Publication of register Section 8 – substitutes the public trustee for the registrar-general as the person responsible for unclaimed money in the *Unclaimed Moneys Act 1950*.

Clause 74 – Examination of accounts etc Section 12 – substitutes the public trustee for the registrar-general as the person responsible for unclaimed money in the *Unclaimed Moneys Act 1950*.

Clause 75 – Technical amendments – sch 1 – provides that schedule 1 contains technical amendments to Acts mentioned in the schedule. Explanatory notes for the technical amendments are included in the schedule.