SECOND READING SPEECH

Justice and Related Legislation (Further Miscellaneous Amendments) Bill 2012

Mr Speaker, this Bill makes a number of relatively minor amendments to correct and clarify the provisions of a number of Acts.

I will outline the reasons for each of the more significant amendments in the order that they appear in the Bill and then refer briefly to two amendments that apply to more than one Act.

Acts Interpretation Act 1931

A number of statutory provisions provide that a person is appointed to an office by the Governor and that the Governor also determines the appointee's entitlements with respect to remuneration, allowances and expenses.

It has been the standard practice for many years to include in an instrument of appointment that contains a remuneration clause the words "*subject to any increase determined by the Government from time to time*".

The wording of the instrument, which is signed by the Governor-in-Council, has been taken to be tacit approval of and authorisation by the Governor of the practice and legitimised by convention over some time.

This practice eliminates the administrative burden of all future increases to the entitlements relating to each appointment being submitted to His Excellency via the Executive Council. The number of appointments where this issue arises is significant as it includes all statutory office holders and a large number of Board/Tribunal members as well as all SES officers and Heads of Agency.

The Solicitor-General is satisfied that under the common law "Carltona doctrine" it is proper and lawful for the Governor to devolve to a Minister of the Crown the function of determining or approving increases in the emoluments payable to appointees.

His Excellency, the Governor, the Hon Peter Underwood AC has raised some reservations about the current practice. Although the current arrangements are not invalid, his Excellency does not consider that this practice is appropriate when an Act provides for emoluments, such as remuneration and allowances, to be "as determined by the Governor". His Excellency considers there would be greater certainty and transparency if the authorisation was supported by a legislative amendment, rather than mere reliance on the Carltona doctrine.

The Solicitor-General suggests that to allay the concerns raised by the Governor a provision could be inserted into the *Acts Interpretation Act 1931* (which provides certain rules for the interpretation of Acts of Parliament and defines certain terms frequently used in Acts) to clarify the issue.

Accordingly, this Bill amends the Acts Interpretation Act to provide that where in any Act it is provided that the Governor may approve, determine or otherwise fix the remuneration, expenses or other emoluments payable to the holder of some office, such power may be exercised as well by any Minister of the Crown or other person authorised in writing by the Governor.

The Governor will continue to make the appointments, which include a determination of the initial remuneration, but the Minister will be able to authorise subsequent changes or increases to that initial remuneration.

Bail Act 1994

You may recall that these further amendments to the *Bail Act* were foreshadowed earlier this year when an amendment was made to a section 7 of that Act in a previous miscellaneous amendments Bill.

Section 4 of the *Bail Act 1994* states that the Act applies to the admission to bail or grant, revocation or variation of bail authorised under any other Act or law. However, the provisions of the Act are silent in respect of bail granted to an appellant pending the outcome of an appeal.

The silence of the Act on bail granted pending an appeal does not affect the power of the Court of Criminal Appeal to grant bail, which is found in the *Criminal Code,* but may affect the operation of other provisions of the Bail Act in relation to that order for bail, for example the ability of a party to apply for the revocation or variation of bail under section 24 of the Act.

The fact that it has only now been realised that the Act is silent in respect of bail granted on appeal would suggest that since its commencement 18 years ago the provisions of the Act have not been required in relation to an order for bail made by the Court of Criminal Appeal.

The practical effect of the *Bail Act* omitting mention of appeals has therefore been negligible to date.

However, now the omission has been recognised, it makes sense to remedy it. This Bill makes the necessary amendments to various sections of the Act to ensure that the provisions apply to bail granted pending an appeal if required.

Whilst the Act was being reviewed in relation to the above matter two further anomalies became apparent.

Section 12 provides that a judge may issue a warrant for the arrest of a person admitted to bail who fails to appear in court in accordance with the court's order.

Since 2006 it has been possible for a Crown Law officer to advise a person on bail in writing that the original date on the order for bail has been altered to a later date so the section is being amended to reflect the date notified in the later notice.

Section 21 has been able to be used since 1998 when section 80 of the *Justices Act 1959* was repealed. This Bill amends that section to institute a new procedure for enforcing payment of any amount required to be recovered.

Building Acts amendments

The amendments to the *Building Act 2000* are to correct two small drafting errors in sections inserted in this Act by the *Building Amendment Act 2012,* which has not yet been proclaimed.

The amendment to the *Building and Construction Industry Security of Payment Act 2009* simply removes a superseded definition.

Community Protection (Offender Reporting) Act

This Act gives a right of appeal to both prosecution and defence against the making of an offender reporting order but currently the prosecution does not have a right to appeal against a refusal to make an order placing a person on the register.

This Bill amends the Act to give the prosecution a right to appeal against the refusal of the court to make an offender reporting order.

Crime (Confiscation of Profits) Act 1993

In 2011 the *Monetary Penalties Enforcement Act 2005* was amended to include a pecuniary penalty order in the definition of fine, so that such orders could be collected by the Director, Monetary Penalties Enforcement.

There are a large number of outstanding pecuniary penalty orders issued prior to the commencement of the 2011 amendment that cannot at this stage be collected by the Director but would have to be collected under the old procedures.

The Office of the Director of Public Prosecutions is not resourced to deal with requests for the payment of such penalties by instalments or to proceed to civil enforcement for non-payment, so generally speaking these outstanding pecuniary penalty orders remain unpaid. This is undesirable as it means that a person on whom an order has been imposed is avoiding a penalty imposed by the court.

To resolve this situation, this Act amends the *Crime (Confiscation of Profits) Act 1993* so that pecuniary penalty orders issued by the court prior to 1 June 2011 may be collected as though they were fines within the meaning of the *Monetary Penalties Enforcement Act*, if they are still unpaid 60 days after commencement of this amendment.

Whilst a pecuniary penalty order had been treated as a civil debt until 1 June 2011, such an order is imposed as a result of a defendant being convicted of a crime and relates to proceeds of that crime (generally a serious drug offence).

This amendment simply alters the way outstanding orders may be collected and imposes no new substantive obligations on the debtor. In fact, collection and enforcement by the Director will give additional payment options to the person on whom the order has been imposed.

It is also proposed to make a minor amendment to section 79(7) of this Act to replace the reference to the *Criminal Injuries Compensation Act 1976* with a reference to the *Victims of Crime Assistance Act 1976*.

Energy Ombudsman Act 1998

This Act still contains references to the "Director of Gas" defined by reference to the *Gas Act 2000*. However, the *Gas Act 2000* no longer utilises that title, having replaced it with a reference to the "Regulator", who is defined under that Act as the Regulator within the meaning of the *Economic Regulator Act 2009*.

This Bill amends the *Energy Ombudsman Act* to remove the definition of "Director of Gas", amend the definition of "Regulator" to mean the Regulator within the meaning of the *Economic Regulator Act 2009*,

remove references throughout the Act to the Director of Gas and, if necessary, replace them with a reference to the Regulator.

Legal Profession Act 2007

Currently a complainant may not apply for a review of a decision of the Board under section 458 if the Board has dismissed a complaint after an investigation (section 451) or after a hearing (section 454(1). The right to review a decision to dismiss a complaint is limited to an appeal against a summary dismissal under section 433.

There is no reason to treat the dismissal of a complaint differently depending on whether it was summary, after investigation or after a hearing.

This Bill amends section 458 to provide that a complainant may also apply for a review of a dismissal of a complaint after investigation or after hearing.

Listening Devices Act 1991

This Act deals with the use of a listening device to record "private conversations" without the consent of the person being recorded.

The Solicitor General is of the opinion that section 5(1)(b) of this Act may prohibit the use of a listening device to record an interview between a suspect and an authorised officer investigating an offence if the suspect does not consent to the interview being recorded or is statutorily compelled to answer questions.

Subsection 5(2)(e) exempts the use of a listening device to record an interview between a police officer and a suspect from this prohibition.

There is a plethora of Tasmanian Acts where an authorised officer who is not a police officer is empowered to investigate a suspected offence under the Act. Legislation ranging from *Electricity Industry Safety and Administration Act 1997* to the *Public Health Act 1997* have explicit provisions allowing an authorised officer to ask questions as part of

investigations, and some provide that the interviewee must answer questions.

Authorised officers in this situation should be able to record any such interview, whether or not the interviewed person consents to the recording or is statutorily compelled to answer, in order to accurately represent the question and responses in any report or evidence.

This Bill therefore amends the Act to include a person appointed under Australian law to prevent or investigate an offence in the definition of "police officer" in subsection (2)(e) and therefore exempt such a person from the application of the section.

The Bill also consequentially amends the *Environmental Management and Pollution Control Act 1994* to remove section 100A, which is no longer required following this amendment to the *Listening Devices Act.*

The Bill makes a consequential amendment to section 100(7) of the *Local Government (Highways) Act 1982* to correct a section reference.

Monetary Penalties Enforcement Act 2005

When the *Monetary Penalties Enforcement Act* was first drafted, a decision was made to deal with compensation orders made by the Supreme Court differently to compensation orders made by the Magistrates Court.

Historically, the Magistrates Court had referred compensation orders to the fines enforcement unit of the Department of Justice for collection, whereas the Supreme Court had treated compensation orders as a matter to be pursued in the civil court. This difference was retained in the Act.

However, it is ultimately a decision of the Government, based on public policy considerations, how penalties imposed by the Courts are to be enforced.

It is an expensive and time-consuming process to pursue payment of a compensation order in the civil court, and the enforcement mechanisms

are limited. It is unfair that those who suffer a comparatively lighter loss have the order to compensate that loss collected by the State when those who have suffered greater damage are left to fund recovery efforts on their own. In addition the Director, Monetary Penalties Enforcement has more enforcement tools at his disposal and therefore a greater likelihood of ensuring ultimate payment of the compensation order.

This Bill amends the Act so that compensation orders made by the Supreme Court will also be referred to the Director, Monetary Penalties Enforcement Service for collection and enforcement.

Section 36 was included in the Act because it was initially assumed that a breach of a Monetary Penalty Community Service Order should be dealt with in the same way as a breach of a Community Service Order made under the *Sentencing Act 1997*.

It has now become apparent that it would be far more efficient for the Director to deal with a breach of a Monetary Penalty Community Service Order in the same way as the breach of any other variation of payment notice, which is to revoke the order and proceed to enforce payment by means of the other enforcement options.

This Bill therefore repeals section 36 and makes consequential amendments to sections 33 and 46 to reflect the fact that enforcement action will be suspended while a person is complying with the order but that non-compliance may result in revocation of the order and enforcement of payment by other means.

This amendment has the added benefit of avoiding taking up court time, especially as the court has no involvement in imposing the community service order and would need to be fully briefed on the history of the matter before sentencing.

Section 73 of the Act currently provides for the seizure and sale of property in which the enforcement debtor has a legal interest but limits it to the seizure of property from the premises of the enforcement debtor, or in the case of a conveyance, for example a motor vehicle,

from a place identified on the Director's database as the place where the conveyance is hangared, parked or moored.

There are occasions where the vehicle of an enforcement debtor is found parked in a public place in which case the restrictions in section 73 operate to prevent the vehicle being seized.

This Bill amends section 73 to allow a conveyance owned by an enforcement debtor to be seized when it is parked in a public place.

Motor Vehicle Traders Act 2011

The Bill corrects two drafting errors in this recent Act by amending section 50 of the Principal Act to substitute "Magistrate" for "justice of the peace" and amending section 53 to substitute "Director' for "Commissioner" and omit subsection (6).

Occupational Licensing Act 2005

The Bill amends sections 42 and 43 of the *Occupational Licensing Act 2005* to allow a contractor, as well as a practitioner, to be granted a licence for up to three years.

The amendment will allow contractors to take advantage of any discount on fees for a three year licence that may be provided for in applicable Regulations.

Resource Management and Planning Appeal Tribunal Act 1993

Section 24 of the *Environmental Management and Pollution Control Act 1994* provides that the Director, Environment Protection Authority may "call-in" an application for a permit under the *Land Use Planning and Approvals Act 1993* in respect of a level 1 activity.

A called-in matter is then subject to a formal environmental impact assessment by the Environment Protection Authority Board.

On completion of an assessment, the Board must notify the relevant planning authority of any conditions or restrictions that the Board requires to be contained in the permit or may direct the planning

authority to refuse to grant the permit. The planning authority must comply with any such requirement or direction.

In a recent appeal before the Resource Management and Planning Appeal Tribunal in relation to conditions on a permit, which included conditions that the Environment Protection Authority Board had required be imposed, a question was raised about the Board's right to be a party to the appeal.

Section 14 of the *Resource Management and Planning Appeal Tribunal Act* sets out who may be parties to an appeal. While it may appear that subsections (2) and (3) give the Appeal Tribunal discretion to join the Board of the EPA, there is a question over whether the Board is legally "a person" within the meaning of subsection 41(1) of the *Acts Interpretation Act 1931* because there is a strong argument that it is an emanation of the Crown.

In addition, where conditions and restrictions on a permit or a refusal to grant a permit were required or directed by the Board it would be preferable for the Board to be a party as of right to any appeal.

There is a strong argument that where an application for a permit has been referred to the Board for the purpose of assessment the Board is a decision-maker, and therefore entitled to appear.

However it is desirable for section14 to be clarified so as to put beyond doubt that the Board is a decision-maker in the relevant circumstances, not to the exclusion of a planning authority (which ultimately issues the permit or refuses the application) but in addition to it. This Bill makes the necessary amendment.

There are currently two conflicting lines of authority on whether the Resource Management and Planning Appeal Tribunal can award costs in a matter where it lacks jurisdiction to hear and determine an appeal.

In *National Trust of Australia (Tasmania) v Launceston City Council et al* the Tribunal determined that where it lacks jurisdiction to hear and determine an appeal, that lack of jurisdiction necessarily means that it

has no jurisdiction to make any order at all, including any order for costs pursuant to section 28 of the Act. However, in a more recent case (*Appeal C938432 against Decision of the Recorder of Titles No C927496 by Connector Pty Ltd* the Presiding Member expressed a different view.

The simplest and most cost efficient way to resolve this impasse is to clarify in the Act whether costs may be awarded where the Tribunal does not have jurisdiction to hear and determine an appeal.

An example of where the Tribunal found it did not have jurisdiction is the recent case of *Krulow v Glamorgan Spring Bay Council* [2011] TASRMPAT 147, where the Environment Protection Notice appealed against was found to have been invalidly issued and therefore a nullity. No appeal lies from a nullity. However, the putative appellants had incurred the same costs in preparing their appeal against the invalid Notice as would have been the case if the notice had been validly issued.

The inability of the Tribunal to award costs where it has no jurisdiction to hear and determine an appeal may encourage vexatious or unmeritorious actions because there is no threat of an award of costs to deter such actions.

This Bill amends section 28 of the RMPAT Act to substitute the word "proceeding" for the word "appeal" throughout in order to allow an application to be made to the Tribunal for an order for costs notwithstanding that there is no appeal to be heard and determined. Whether or not the Tribunal makes a costs order will depend on the usual factors that are taken into account in determining whether one party should bear the costs of the other.

The Bill also contains a provision stating that the amended section 28 applies to any proceedings before the Tribunal where the issue of costs remains outstanding.

This provision is simply a restatement of the common law in respect to the application of the amended section. At common law costs provisions are procedural. Any change to a procedural provision made after proceedings have commenced has retrospective effect and applies

to the pending proceedings unless the legislation clearly indicates otherwise.

It was decided to restate the common law to make clear what the effect of the change would be. An estimated 7 matters are awaiting clarification of the interpretation of section 28 so that costs may be finalised.

While it may be seen as unfair to potentially alter the law existing at the time a matter came before the Tribunal, the split line of authority in the Tribunal has meant that there has been uncertainty about whether or not costs can be awarded. It is therefore unlikely that any party to a matter where costs are yet to be decided relied upon the awarding or non-awarding of costs when deciding whether to pursue the matter.

Clarifying this clearly in the amending legislation ensures that there will be no need to wait for a matter to proceed to the Supreme Court for a decision either on the interpretation of the present section or in relation to whether the change to the provision applies to existing matters, although the law on the latter appears to be quite clear.

Sentencing Act 1997

Currently under sections 27 (Breach of order suspending sentence), 36 (Breach of community service order), 42 (Breach of probation order) and 54A (Contravention of rehabilitation program order) the court has a power to issue an arrest warrant if the offender fails to appear on the hearing of an application under the section.

However, it is often the case that an application cannot be served on the offender because his or her whereabouts is unknown. This is in spite of the fact that an offender who has been sentenced to serve such an order breaches that order if they change their address or employment without giving notice of that change to a probation officer.

This Bill amends the relevant sections to provide that a court may issue an arrest warrant where reasonable efforts have been made to serve an

application under the relevant section, but service has not been possible because the offender's whereabouts is unknown.

If an arrest warrant is issued, it can then be entered onto the police data-base and if the offender comes to the attention of police for any reason the warrant will be executed and the offender brought before the court.

Prior to changes to the Act commencing in January 2011 section 32 of the Justices Act 1959 was used in these circumstances, but that is no longer possible as these matters now proceed by way of application, not complaint and section 32 of the Justices Act 1959 only applies to complaint. The absence of this power is causing Community Corrections difficulty in bringing a substantial number of offenders before the court as failure to notify of a change of address is not uncommon.

Various Acts – change of name from "National Institute of Accountants" to the "Institute of Public Accountants"

The National Institute of Accountants changed its name to the Institute of Public Accountants in May 2011. This Bill amends the sections of the *Baptist Union Incorporation Act 1902, Security and Investigations Agents Act 2002 , Prepaid Funerals Act 2004, Conveyancing Act 2004 and the Property Agents and Land Transactions Act 2005* that specifically refer to that body.

Various Acts – removal of superfluous infringement notices provision.

In June 2011 two amendments were made to the *Monetary Penalties Enforcement Act 2005* (MPEA). The first was an amendment to the definition of "public sector body" in section 3 to clarify that an individual authorised to issue or serve an infringement notice under other legislation comes within the definition. The second was an amendment to section 14 to clarify that the phrase "prescribed penalty or penalties that are applicable" in subparagraph (a)(ii) may refer to penalties prescribed under the Act that creates the offence in respect of which the infringement notice was served. The amendments were

retrospective to the commencement of the MPEA to ensure that there could be no challenge to an infringement notice issued prior to the amendments commencing.

Prior to these amendments being made Parliamentary Counsel took the precaution of clarifying these two points when drafting new sections relating to infringement notices in various Acts, to avoid any possibility of a challenge to the application of *Monetary Penalties Enforcement Act 2005*. Since that Act has now been amended, these clarifying subsections are now not only redundant, but also contain a cross reference to a wrong section as a result of the recent amendments.

This Bill repeals the redundant provisions in the *Australian Consumer Law (Tasmania) Act 2010; Dangerous Goods (Road and Rail Transport) Act 2010*; *Gaming Control Act 1993; Health Services Establishment Act 2006; Litter Act 2007; Motor Vehicle Traders Act 2011* and the *Rail Safety Act 2009*.