Western Australia

Aboriginal Affairs Planning Authority Amendment Bill 2012

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Western Australia

LEGISLATIVE COUNCIL

Aboriginal Affairs Planning Authority Amendment Bill 2012

A Bill for

An Act to amend the *Aboriginal Affairs Planning Authority Act 1972* and to consequentially amend the *Unclaimed Money Act 1990*.

The Parliament of Western Australia enacts as follows:

Part 1 — Preliminary

1. Short title

This is the *Aboriginal Affairs Planning Authority Amendment Act 2012*.

2. Commencement

This Act comes into operation as follows —

(a) sections 1 and 2 — on the day on which this Act receives the Royal Assent;

(b) the rest of the Act — on a day fixed by proclamation.

Part 2 — *Aboriginal Affairs Planning Authority Act 1972* amended

3. Act amended

This Part amends the *Aboriginal Affairs Planning Authority Act 1972*.

4. Part IV deleted

Delete Part IV.

5. Part VII inserted

After section 51 insert:

Part VII — Savings provisions: *Aboriginal Affairs Planning Authority Amendment Act 2012*

52. Estates of persons who died before commencement day

(1) In this section —

commencement day means the day on which the *Aboriginal Affairs Planning Authority Amendment Act 2012* section 4 comes into operation;

former provisions means Part IV of this Act as it was in force immediately before its deletion by the *Aboriginal Affairs Planning Authority Amendment Act 2012*.

(2) The estate of a person who died before commencement day must be distributed or otherwise dealt with after commencement day as if the former provisions had not been deleted.

Part 3 — *Unclaimed Money Act 1990* amended

6. Act amended

This Part amends the *Unclaimed Money Act 1990*.

7. Section 9 amended

Delete section 9(1)(a).

EXPLANATORY MEMORANDUM

Aboriginal Affairs Planning Authority Amendment Bill 2012

Part IV of the *Aboriginal Affairs Planning Authority Act 1972* (the AAPA Act) provides a separate scheme for the administration of deceased estates of persons of Aboriginal descent from that of non-Aboriginal persons.

The scheme has been criticised for being administratively burdensome and potentially discriminatory to Aboriginal people. For example, the qualification requirement in section 33 of the AAPA Act that a person of Aboriginal descent be 'full blood descended from the original inhabitants of Australia or more than one-fourth of the full blood' is difficult to apply in practice and may cause offence to Aboriginal people. The automatic vesting of an estate in the Public Trustee under section 35 of the AAPA Act denies the right of families to administer the estate of a deceased Aboriginal relative.

The purpose of this Bill is to achieve parity at law for Aboriginal people in this area by applying the same scheme of distributing intestate estates to Aboriginal people as non-Aboriginal people.

Part 1 – Preliminary

Clause 1. Short title

Provides that the name of the Bill when enacted is the *Aboriginal Affairs Planning Authority Amendment Act 2012* (the Act).

Clause 2. Commencement

Provides that:

a) Sections 1 and 2 of the Act come into operation when the Act receives Royal Assent; and
b) The rest of the Act comes into operation on a date fixed by proclamation.

Part 2 – *Aboriginal Affairs Planning Authority Act 1972* amended

Clause 3. Act amended

This Part amends the AAPA Act.

Clause 4. Part IV deleted

This section deletes Part IV of the AAPA Act.

The effect of repeal of section 35 of the AAPA Act will be such that after the commencement date of the amending Act, all estates previously administered under Part IV will be administered under the *Administration Act 1903.*

As there is no evidence to suggest the Department of Indigenous Affairs (DIA) or the Public Trustee has ever received money or property under section 36 of the AAPA Act, the repeal of this section is necessary.

By repealing section 37 of the AAPA Act, any money or property held by the Public Trustee or the Chief Executive Officer of DIA on behalf of a person of Aboriginal descent, will no longer vest in the Aboriginal Affairs Planning Authority (the Authority). By virtue of section 37(1)(c) of the *Interpretation Act 1984*, any rights and entitlements that may have accrued before repeal of section 37 of the AAPA Act will be preserved.

Clause 5. Part VII inserted

Part VII – Savings Provisions: *Aboriginal Affairs Planning Authority Amendment Act 2012*

52. Estates of persons who died before commencement day

Subsection (1) provides in this section -

commencement day means the day on which the *Aboriginal Affairs Planning Authority Amendment Act 2012* section 4 comes into operation;

former provisions means Part IV of this Act as it was in force immediately before its deletion by the *Aboriginal Affairs Planning Authority Amendment Act 2012.*

There will be a number of deceased estates already vested in the Public Trustee as at the commencement date. The Bill contains saving provisions to ensure that these estates continue to be processed under Part IV of the AAPA Act. This provides for an uncomplicated transition between the old and new legislative scheme.

Part 3 – *Unclaimed Money Act 1990* amended

Clause 6. Act amended

This Part amends the *Unclaimed Money Act 1990*.

Clause 7. Section 9 amended

This section deletes section 9(1)(a) of the *Unclaimed Money Act 1990*.

Repeal of section 37 of the AAPA Act requires consequential amendments to section 9 of the *Unclaimed Money Act 1990*. Amendment to section 9 of the *Unclaimed Money Act 1990* will remove from the definition of 'prescribed unclaimed money', any money which comes under Part IV of the AAPA Act but has not yet been vested in the Authority.

By virtue of section 37(1)(c) of the *Interpretation Act 1984* any rights and entitlements that may have accrued before repeal of section 37 of the AAPA Act will be preserved.

and to reinforce the importance of regular school attendance. Messages are also being developed specifically for parents of children with special needs and parents of children from diverse backgrounds, including Aboriginal families. It is anticipated that the implementation of the compulsory preprimary year of school education in 2013 will not incur an additional cost to government.

Finally, and very importantly, the department is confident that all preprimary children will be accommodated at their local schools.

Pursuant to standing order 126(1), I advise that this bill is not a uniform legislation bill. It does not ratify or give effect to an intergovernmental or multilateral agreement to which the government of the state is a party; nor does this bill, by reason of its subject matter, introduce a uniform scheme or uniform laws throughout the commonwealth.

I commend the bill to the house and table the explanatory memorandum.

[See paper 5077.]

Debate adjourned, pursuant to standing orders.

ABORIGINAL AFFAIRS PLANNING AUTHORITY AMENDMENT BILL 2012

Introduction and First Reading

Bill introduced, on motion by **Hon Peter Collier (Minister for Indigenous Affairs)**, and read a first time.

Second Reading

HON PETER COLLIER (North Metropolitan — Minister for Indigenous Affairs) [5.44 pm]: I move —

That the bill be now read a second time.

The Aboriginal Affairs Planning Authority Amendment Bill 2012—the bill—proposes to change an act that currently operates in a way that can disadvantage Aboriginal people who die without a will. The bill repeals part IV of the Aboriginal Affairs Planning Authority Act 1972—the AAPA act. The effect of the proposed repeal is to achieve parity at law for Aboriginal people who die intestate by bringing them under the same scheme of distributing intestate estates as non-Aboriginal people.

Under the current statutory regime, section 33 of the act applies to "a person of Aboriginal descent only if he is also of the full blood descended from the original inhabitants of Australia or more than one-fourth of the full blood". The AAPA act states that if an Aboriginal person dies without a valid will, the estate is to be administered by the Public Trustee. Debts and liabilities of the deceased are paid before the estate is distributed under the Administration Act 1903. If an entitled person cannot be found, the Public Trustee is required to refer to the Aboriginal Affairs Planning Authority Act Regulations 1972, which includes matters under customary law, and identify those people with a moral claim. In trying to accommodate the special interests of Aboriginal people, the scheme has operated in what can be argued is an unnecessarily complex way that can disadvantage those people it has sought to protect.

The origins of part IV of the AAPA act can be traced back to the Native Welfare Act 1963. Some provisions go as far back as the Aborigines Act 1905. In 2004, part IV of the AAPA act was amended with the repeal of section 35(5) relating to the issuing of a certificate as conclusive evidence of a person entitled under the AAPA act regulations to succeed to the deceased's estate. With the repeal of this section, the part IV scheme became more difficult to administer because the burden of proving entitlements under the regulations was usually quite onerous. Aside from the 2004 amendments, there have otherwise been very few changes to the part IV scheme since its inception in 1972.

The Public Trustee and the Department of Indigenous Affairs agree that the act is long overdue for reform. Criticisms of part IV of the AAPA act were highlighted by the Law Reform Commission of Western Australia in its 2006 report on Aboriginal customary laws. In its report, the Law Reform Commission discussed how the AAPA act scheme discriminated against Aboriginal people as the automatic vesting of the estate in the Public Trustee denied families the right to administer the estate of their deceased relatives. The reforms proposed in the Aboriginal Affairs Planning Authority Amendment Bill 2012 incorporate many of the key recommendations made by the Law Reform Commission in its 2006 report on Aboriginal customary laws.

The Aboriginal Affairs Planning Authority Amendment Bill 2012 repeals part IV of the AAPA act in its entirety. There will no longer be a separate scheme for the administration of the deceased estates of Aboriginal people. The repeal of part IV will ensure that the laws regarding the succession of deceased estates are uniform for all Western Australians. The bill also seeks to remove the offensive definition of a person of Aboriginal descent in section 33 of the act. Further to this, another significant change is to remove the provisions in section 35 of the act that automatically vest the estate of a deceased Aboriginal person in the Public Trustee. By enacting this bill, a family member of a deceased Aboriginal person will enjoy the same rights to administer the estate of their deceased relative as any non-Aboriginal person.

I have instructed the Department of Indigenous Affairs to work on developing policies associated with the proposed legislative change. This will include considering the development of an education program to inform Aboriginal people of the change in the law, as well as wider wills and estate planning advice.

In closing, I would like to reflect on the fact that this year marks the fortieth anniversary since the part IV scheme was introduced into this Parliament. It is timely for Parliament to consider reform to this area of law affecting Aboriginal people. Repealing this part of the legislation will deliver parity in this sensitive area of the law for Aboriginal people by providing them with the same rights as non-Aboriginal people.

Pursuant to standing order 126(1), I advise that this bill is not a uniform legislation bill. It does not ratify or give effect to an intergovernmental or multilateral agreement to which the government of the state is a party; nor does this bill, by reason of its subject matter, introduce a uniform scheme or uniform laws throughout the commonwealth.

I commend the bill to the house and table the explanatory memorandum.

[See paper 5078.]

Debate adjourned, pursuant to standing orders.

COURTS LEGISLATION AMENDMENT BILL 2012

Introduction and First Reading

Bill introduced, on motion by **Hon Michael Mischin (Attorney General)**, and read a first time.

Second Reading

HON MICHAEL MISCHIN (North Metropolitan — Attorney General) [5.48 pm]: I move —

That the bill be now read a second time.

This bill amends the Criminal Procedure Act 2004 and the Magistrates Court (Civil Proceedings) Act 2004. This bill addresses two issues: the powers that may be conferred on a registrar of a superior court—namely, the Supreme or District Courts—to facilitate the case management of prosecutions on indictment; and the power of the District Court and the Supreme Court to extend the time to entertain appeals from decisions of the Magistrates Courts.

The first issue is the subject of part 2 of the bill. Section 124 of the Criminal Procedure Act empowers the Supreme and District Courts to make rules of court to regulate the practice and procedure to be followed by that court in respect of that court's criminal jurisdiction. Presently, section 124(5)(a) provides that each court may confer on a registrar of that court jurisdiction to deal with applications and other matters that do not involve the final determination of a prosecution. Doubt has emerged as to the extent of the powers that rules of court can invest in registrars. In the case of the District Court, this has resulted in the need to provide limited judicial commissions to registrars in order to ensure that they can carry out many functions relating to routine case management in a manner that will not leave their decisions open to challenge. The amendments to the Criminal Procedure Act contemplated by clause 4 of the bill will enable the rules to delegate to a registrar of the Supreme or District Court the whole of that court's criminal jurisdiction, excepting the jurisdiction to find a person guilty or not guilty of an offence; to discharge an accused from a charge; to consent to the discontinuance of a charge in a case where the accused does not consent to the discontinuance; to stay a prosecution; to set aside a committal; or to find a person guilty of contempt of the court. A person dissatisfied with a decision of a registrar will be able to appeal the decision to a judge of the court. The appeal cannot be commenced more than 21 days after the date of the registrar's decision unless a judge gives leave to extend the time. The appeal is to be by way of a new hearing of the issue that was before the registrar.

The effect of the amendments will be that a registrar will be able to deal with most interlocutory aspects of a criminal matter—including decisions as to bail—short of making final determinations that should be reserved to a judicial officer. This will release judges from the more routine aspects of case management preliminary to trials and provide for the more efficient and effective use of judicial and court resources. The amendments have been referred to the Chief Justice and the Chief Judge for comment. Both support the amendments being made.

The second issue dealt with by the bill is addressed in part 3, which amends the Magistrates Court (Civil Proceedings) Act 2004 (WA). The amendment to section 40 of that act will clarify the power of the District Court to extend the time available to appeal to the District Court against decisions of the Magistrates Court. At present the act provides that an appeal must be made within 21 days of a judgement. There is no mention in the act of a power to extend the time. There are conflicting decisions of the District Court as to whether there is any power to extend time to appeal.

In Wise v Proprietors of Strata Plan 21513 [2008] WADC 80 and Lau v Chau [2009] WADC 172, different District Court judges held that section 40 of the Magistrates Court (Civil Proceedings) Act was not clear enough