

MACHINERY OF GOVERNMENT (MISCELLANEOUS AMENDMENTS) BILL 2003

Consideration in Detail

Clause 1 put and passed.

Clause 2: Commencement -

Mr J.C. KOBELKE: I move -

Page 2, lines 18 to 22 - To delete the lines.

The amendments I will move are largely of a technical nature. A lot of the amendments relate to the fact that other legislation has gone through the Parliament since this Bill was drafted, and the Bill is simply being updated to take into account other legislation that has superseded it and made changes to particular Acts. The amendment is a consequence of the Statutes (Repeals and Minor Amendments) Act 2003, which commenced on 15 February 2003. That is why the Government is moving the amendment to clause 2.

Amendment put and passed.

Clause, as amended, put and passed.

Clauses 3 to 71 put and passed.

Clause 72: The Act amended -

Mr J.C. KOBELKE: The Government opposes this clause. It is a consequence of the Acts Amendment and Repeal (Courts and Legal Practice) Act 2003, which repealed the Legal Practitioners Act 1893 on 1 January 2004. As a consequence, the clause is no longer required.

Clause put and negated.

Clause 73: Sections 25 and 28E amended -

Mr J.C. KOBELKE: The advice I gave on clause 72 applies to clauses 72 to 74.

Clause put and negated.

Clause 74 put and negated.

Clauses 75 to 95 put and passed.

Clause 96: The Act amended -

Mrs C.L. EDWARDES: Clauses 96 to 110 deal with changes to the Community Services Act 1972. I am quite happy to deal with the clauses in total and the referral of the creation of the ministerial bodies rather than go through each clause. Why has the Government gone down this path? It is not new; it has been done for the Department for Planning and Infrastructure, as I understand it. It is a similar model to that department. Why is it necessary to replace the existing ministerial corporate body with the Department for Community Development ministerial body?

Mr J.C. KOBELKE: This is a procedural matter. The member is aware of the terms in which it was presented during the second reading speech. I think she is across the key components of the Bill. We are putting in place a new regime, which means that the same title and status of the minister applies. We are doing it in such a way that any future Government can do that without going through the statutes. This change fits the same model.

Mrs C.L. EDWARDES: I understand the uniform badging provisions in the Bill. However, this model has not been put in place for every Act, department and minister. What is it about the Community Services Act that the Government is putting in place a community development ministerial body?

Mr J.C. KOBELKE: My understanding is that the Minister for Community Development has had a corporate structure for many years and that only certain ministers have a corporate entity. The Department of Conservation and Land Management executive body is another. When organisations have that corporate status, this is the model used to reflect that.

Clause put and passed.

Clauses 97 to 137 put and passed.

Clause 138: The Act amended -

Mrs C.L. EDWARDES: As before, this is a grouping of amendments from clauses 138 to 141 dealing with amendments to the Companies (Co-operative) Act 1943. Although there are many amendments dealing with delegation of powers and protection from liability for wrongdoing, I wonder why these amendments are being introduced now regarding the delegation powers of the commissioner, the confidentiality of information, the

protection from liability for wrongdoing and the judicial notice of the official signature? What is it about this Act that it now requires these amendments? Is it purely because of the separation from the former Department of Consumer Affairs? This Act has been in existence for a long time.

Mr J.C. KOBELKE: The current structure requires that there be provisions in the Acts that relate to cooperatives that sit in the portfolio of the Minister for Consumer and Employment Protection or the Ministry of Fair Trading, as it was in the past. We are seeking to allow the statute to stand alone so that at any time it can be allocated to another minister. There is no intention to do that as it is an area in which I have a personal interest and I would like to keep it in my portfolio and do things with it. In terms of giving flexibility to the structure of government, the referencing of a statute sometimes requires the use of another statute. The other statute may be with the Attorney General so the issue is to make provision so the Act can stand alone. This frees up the potential to allocate it to a different portfolio if the Government of the day so decides.

Clause put and passed.

Clauses 139 to 144 put and passed.

Clause 145: The Act amended -

Mr D.F. BARRON-SULLIVAN: Clauses 145 to 153 go to the heart of the Consumer Affairs Act. I will pursue with the minister the fact that these provisions give the commissioner or the commissioner's delegate some very extensive powers. For example, proposed new section 17 gives the commissioner the power to publish warnings about unsatisfactory or dangerous goods and so forth. Proposed new section 23 enables the commissioner to delegate to other people the same powers and duties that the commissioner would have in accordance with this matter. One issue that has been raised with us is essentially a concern that the Government is giving some public servants very extensive powers, and not necessarily in the most accountable way. I will give an example. From time to time the Commissioner for Fair Trading issues notices about practices undertaken by businesses without actually charging those businesses with anything. On the one hand, we can say that we are trying to protect the consumer, but, on the other hand, under an Act of Parliament, not only the commissioner but also his staff must be accountable. A situation could arise in which a business finds itself on the receiving end of some extensive statewide publicity from the commissioner or the commissioner's delegate - a staffer in the department undoubtedly - and yet there may be insufficient substance to that complaint for any charges to be laid. In most cases, one would have confidence that the commissioner and the staff would do the right thing. Some people have indicated that essentially this provision gives carte blanche to the commissioner and his staff to issue those sorts of warnings. There is a concern that some small business people may be harassed or may unwittingly find themselves on the receiving end of some very bad publicity. If we are talking about provisions for accountability and provisions that go to the very essence of good government, it seems only right that the legislation should contain some safeguards to ensure that the commissioner and his staff do not have that sort of unfettered power. Can the minister comment on how he sees this operating and the sorts of warnings and so forth he can see being issued? What safeguards are in the legislation, because I do not see too many?

Mr J.C. KOBELKE: The Commissioner for Fair Trading is a statutory position. That reflects the importance of the post. Also, it is an independent position. Value judgments must be made by the commissioner about how to best protect the public interest and consumers. Section 17 of the Consumer Affairs Act sets out the functions of the department. Paragraph (c) provides that one of the functions of the department is -

to receive complaints from consumers concerning matters touching their interests as consumers, to consider and, if the Commissioner considers it warranted, to investigate those complaints and to take such action in respect of those complaints as seems proper to the Commissioner.

In passing I note that that judgment is left to the commissioner, even when the complaint is investigated. The more serious matter that the member is clearly raising is that the commissioner can then take action to name publicly a particular trader. The difficulty is that the department may not be able to mount a successful prosecution, but the weight of evidence may be such - there have been recent cases of this - that it is necessary to give a public warning about a particular trader. One example is an airconditioning business that simply did not provide a service and product that came up to the mark. It did not rectify the matter in any efficient way. When the department develops a file of 10 or 20 cases and it simply cannot get effective action out of a business, the issue of prosecuting on each individual case may not be the productive way to provide that protection; therefore, to give a public warning is the most effective way to provide protection. I understand the member's concern, because if a commissioner abuses that power at a given time, he could do a great injustice to a particular enterprise or company. However, it is necessary that the commissioner have that power.

Another provision of the Act gives legal immunity to people who carry out their work, but there is a little uncertainty about whether the department should take on a big company that decides that it will really try it on to show that the department does not have the legal power to do it. We do not want to get caught up in lengthy

legal proceedings in seeking to protect the commissioner. These amendments provide a very clear head of power for the commissioner to do what the commissioner has already done on a very limited number of occasions, but they make it quite unequivocal that there are powers to do that.

Mr D.F. BARRON-SULLIVAN: I understand what the minister is saying. Basically he is telling us what is in the Bill. A number of cases have been referred to me and I have taken them up with the minister's office, but usually informally. One case that springs to mind, which I took up by way of some questions on notice, involved the commissioner issuing a warning about a particular business. I asked some questions on notice and it became apparent that the company concerned was not breaking either federal or state laws, yet when the commissioner was questioned about statements he had made in the media alleging that the business was breaking federal laws, the commissioner replied that he had been misquoted. At no stage has the commissioner apologised or run an advertisement in the paper. It has done that business a lot of damage. That is an example in which maybe the commissioner was misquoted. I have looked at the material and I cannot see how on earth he was, but maybe he was. The point is that there is no accountability; the commissioner has done it, he has not apologised, we move on and he has damaged a business in the meantime. I do not want to go into the rights and wrongs of what the business was doing. Another example springs to mind. Some people have said that they did not like the practices of this particular business because they used pretty aggressive marketing practices, but there was nothing illegal about them. I can think of far more aggressive marketing practices than the ones that this business was carrying out. Yet that business was subjected to a lot of publicity but never any charges. No action was taken against it.

I have had a look at the situation in the other States. I realise that the New South Wales legislation is very similar. It states in part that the minister or the director general is not to make or issue a statement under this section unless satisfied that it is in the public interest to do so. That is a pretty nebulous statement to have in legislation. Victoria's legislation is worded similarly. It is interesting that when we made inquiries of Consumer Affairs Victoria, we were told that, under section 162A of the Victorian Fair Trading Act, the director can issue public warning statements. However, we were told that no protection for doing so is offered. In other words, there is no protection if the director in Victoria were to take similar action and the small business wanted to take action against the director. It is interesting that that is the department's interpretation. I read the Victorian legislation in a similar way as the New South Wales legislation and the legislation that we are dealing with today. We were even told that the department had tried to have some protection amendments added to the legislation, but had failed. I have an obvious question for the minister. This legislation provides extensive powers to not only the commissioner but also the commissioner's delegates. We are not just talking about the most senior public servant. We have no idea to whom he might delegate authority, how competent that person might be or whether that person has a gripe with a small business or whatever. At the end of the day we are extending very broad powers of the sort that could put a small business out of business, yet there are no accountability provisions. If we are giving the commissioner and his delegates these powers, how will the commissioner or his delegates be held accountable?

Mr J.C. KOBELKE: At the end of the day they will be held accountable through the minister and the public. I would be happy for the member for Mitchell to provide me with the examples that he said he has. I do not think that we should highlight the particular companies publicly in this place, but if the member gave them to me later, I would be happy to look into them. That is a key element of the accountability.

Mr D.F. Barron-Sullivan: I have raised one example through the Parliament and nothing got done. By then the damage is done. If there were a specific accountability provision in here, the sword of Damocles would be hanging over the commissioner and the department would think twice before sending out information that could ruin a small business's livelihood.

Mr J.C. KOBELKE: Similar provisions are in place in New South Wales. I am not aware of any complaints of them being abused. There is always an element of judgment. Confidence is placed in the commissioner, whomever that might be, at the given time. The member for Mitchell is right. If a commissioner went off the rails and acted outside expected and appropriate behaviour, I would not countenance that. That is an issue of accountability of the minister and the Parliament and their ability to bring those matters into the public arena. The commissioner holds a statutory position. He has responsibilities. His judgment comes into play. Even whether an investigation is undertaken is a matter of judgment. We therefore rely on our public sector, not just in terms of the commissioner as the person who has the statutory responsibility, but also the whole functioning of that agency, its professionalism and the development of skills through it, to provide a guarantee that those powers will not be abused.

Mr D.F. BARRON-SULLIVAN: I will harp on this issue a bit more, because it is very important. Proposed section 70 under clause 156 - it is later provided under clause 165 - provides protection from liability for wrongdoing when somebody has basically done something in good faith in undertaking the performance of a

function under this legislation and so forth. Further protections are provided elsewhere. I come back to the fact that enormous protection is dotted all the way through this Bill for the commissioner and the commissioner's delegates or staff. It goes back to the fact that the commissioner will now have extended to him or her very extensive powers to publicise matters and to issue warnings and so on, and to issue them publicly of course, on what he or she may consider to be unfair business practices. As the minister said earlier, it is at the commissioner's discretion. The commissioner may look at something and make a decision based on the advice of the staff member who has been investigating it. A fairly junior public servant could become the judge and jury of a small business. There must be some form of accountability provision. In effect, this would give an almost judicial authority to some public servants, who would invariably be well meaning and dedicated to the job and so on but who might make a mistake. In the process they might issue a warning that could cause great harm to a small business. One of the small business associations in the State has suggested something to me, because small business has serious concerns about this aspect of the legislation. It said that if the commissioner is to be given the ability to name businesses, he must provide detailed reasons for doing so. There must also be provision in the legislation for redress, such as for an apology to be made, compensation to be issued and so on, if a business is not ultimately charged or some direct action taken against it. Otherwise, this would give enormous authority to this bureaucracy but would not hold it accountable. That goes against the essence of good government and accountability in government.

Mr J.C. KOBELKE: The member referred to proposed section 70 within clause 156 on page 69 of the Bill. Proposed section 70 applies only to the Co-operative and Provident Societies Act; it does not apply across the whole area. If powers are delegated, the commissioner remains responsible for decisions made by the delegatee. That provides accountability. It fits within our whole system of government. People can seek the information on which the public naming was undertaken through freedom of information legislation. The Office of the Auditor General might have a role. People would be able to go to the Ombudsman if they felt that the actions of the commissioner were not undertaken in good faith, as they are required to be. The Corruption and Crime Commission could respond to any issue of impropriety or criminality. There is a range of areas of accountability if people felt that the commissioner, in a particular instance, had not acted in good faith or had gone beyond what was reasonably expected.

Mr D.F. BARRON-SULLIVAN: I realise that the example I gave related to the Co-operative and Provident Societies Act. I could have given the same example from the Credit (Administration) Act, the Petroleum Products Pricing Act, the Travel Agents Act and so forth. The point I am trying to make is that the legislation we are dealing with today provides a tremendous degree of protection to public servants and a tremendous degree of authority to the commissioner and his delegated officers, but it does not provide any direct accountability for such authority. Proposed new section 23 under clause 151 makes it clear. Proposed subsection (5) states -

Nothing in this section limits the ability of the Commissioner to perform a function through an officer or agent.

Proposed subsection (1) states -

The Commissioner may delegate to any other person employed in the Department -

I repeat: the commissioner can delegate to any other person. It could be the most junior person in the department right through to the second-in-command. It continues -

any power or duty of the Commissioner under a provision of this or any other Act, other than this power of delegation.

These authorities can be delegated to officers.

The relevant person did not ask me to raise this matter with the minister, so I will talk in generic terms. The other day I discussed with a businessperson a matter to do with vehicle licensing plates. I went through this matter with this small business person and it was abundantly clear that this person was experiencing some serious harassment from a public servant. I am going on face value. I have heard only one side of it. We are doing some further work on this matter. If we need to, we will refer it to the minister. If everything I was told was correct, and I have no reason to doubt it - I went into the detail and it would be hard for it to be otherwise - it is clear that this person was getting the raw end of the deal because he had upset a public servant. He was copping it in the neck as a result. We could transpose that onto the situation under this legislation. For example, a small business may have been very aggressive in its marketing tactics or whatever, to which someone in the department has taken a dislike. The next minute, a memo is made and a report placed on the commissioner's desk. The next minute there is a press release, and the next minute that small business is suffering. I do not have any problems with cracking down on errant businesses that try to rip off consumers and so on, but when the powers are extended in this way to give officers of the department delegated authority, there must be appropriate

accountability provisions. What is wrong with the minister saying right now that he will ensure in the regulations that whenever the commissioner names a business in accordance with proposed section 70 or whatever, he will provide full written reasons for it, which the minister will table in the Parliament? That would be great - full accountability! However, when it is deemed that that business has not done anything wrong, we must at least be prepared to say sorry and to give it some compensation. Depending on the minister's answer now, and, perhaps, later in the third reading debate, this is something that will need to be taken up in detail in the other place.

Clause put and passed.

Clauses 146 to 186 put and passed.

Clause 187: Section 6 amended -

Mr J.C. KOBELKE: This amendment is consequential to the passage of the motor vehicle dealers legislation. I move -

Page 86, after line 7 - To insert the following -

(3) Section 6(3) is repealed and the following subsection is inserted instead -

“

(3) A reference in section 19, 20, 21 or 22 (of the *Consumer Affairs Act 1971* as applied by subsection (1)) to the Commissioner includes a reference to an authorised officer who has been approved by the Commissioner for the purposes of those sections.

”

Amendment put and passed.

Clause, as amended, put and passed.

New clauses 188 to 190 -

Mr J.C. KOBELKE: I move -

Page 86, after line 7 - To insert the following -

Division 17 - *Motor Vehicle Repairers Act 2003*

188. The Act amended

The amendments in this Division are to the *Motor Vehicle Repairers Act 2003**.

[**Act No. 68 of 2003.*]

189. Section 3 amended

Section 3(1) is amended by deleting the definition of “Commissioner” and inserting instead -

“**Commissioner**” means the person for the time being designated as the Commissioner under section 7;

190. Section 7 replaced

Section 7 is repealed and the following sections are inserted instead -

“

7. Commissioner

(1) The Minister is required, by notice published in the *Gazette*, to designate a person who is an executive officer of the Department as the Commissioner for the purposes of this Act.

(2) The Commissioner may be referred to by a title specified by the Minister by notice published in the *Gazette*.

(3) In this section -

“**executive officer**” has the meaning given by section 3(1) of the *Public Sector Management Act 1994*.

7A. Commissioner's powers

Sections 19, 20, 21, 22, 23, 23A, 24 and 25 of the *Consumer Affairs Act 1971* apply, with such modifications as are necessary, to and in relation to the functions of the Commissioner and persons and matters affected by the exercise of those functions as if the sections were part of this Act.

”

I move this amendment for the same reasons as consequential to the passage of the Motor Vehicle Repairers Act 2003.

New clauses put and passed.

Clauses 188 to 238 put and passed.

Clause 239: Part 1A inserted -

Leave granted for the following amendments to be moved together.

Mr J.C. KOBELKE: I move -

Page 110, lines 16 and 17 - To delete the lines.

Page 112, lines 15 to 18 - To delete the lines.

These amendments are consequential to amendments contained in the Economic Regulation Authority Act 2003.

Amendments put and passed.

Clause, as amended, put and passed.

Clauses 240 to 257 put and passed.

Clause 258: The Act amended -

Mr J.C. KOBELKE: I will oppose this clause, which is a consequential amendment to the Economic Regulation Authority Act. Even though it applies to a different Act, it is as a consequence of that Act from 2003 that we need to make this amendment by deleting the clause.

Clause put and negated.

Clause 259: Section 47 amended -

Mr J.C. KOBELKE: For the same reason I will oppose clauses 259 and 287 to make sure they fit in as consequential changes to the amendments contained in the Economic Regulation Authority Act 2003.

Clause put and negated.

Clauses 260 to 286 put and passed.

Clause 287: Various references to Executive Director changed to CEO -

Mr J.C. KOBELKE: Earlier, we repealed section 34, which now makes redundant the reference to it on page 129. Therefore, I seek to delete those two lines. I move -

Page 129, lines 5 and 6 - To delete the lines.

Amendment put and passed.

Clause, as amended, put and passed.

Clauses 288 to 371 put and passed.

Clause 372: Long title amended -

Mrs C.L. EDWARDES: Clauses 372 to 394 and some subsequent amendments up to clause 404 deal with the merging of the Country Housing Authority and the Government Employees Housing Authority into the State Housing Commission under the Housing Act. Why is the minister abolishing those two authorities and putting them under the same existing government department and, therefore, abolishing the boards of management that effectively look after those two authorities, and putting it under the chief executive officer? What is the public benefit in doing that?

Mr J.C. KOBELKE: The authority will remain, but the board will be done away with. This is being done because the Government is reverting to a more traditional public service structure in which the department and the director general has authority rather than vesting all or part of the authority in various areas with independent boards. This is a theme of the machinery of government of making ministers and directors general responsible. Unless there are very special reasons, the use of independent boards as part of the substructure is not the structure that will be continued or maintained.

Clause put and passed.

Clauses 373 to 395 put and passed.

Clause 396: Section 2 amended -

Mrs C.L. EDWARDES: Under the definition of “public work”, clause 396 will insert the definition “public housing”. I am advised that public housing was outside the guidelines of contracting for public work. The minister’s notes confused me. The clauses in the Bill seem to be fairly simple other than the explanation that public housing was outside the guidelines for contracting for public work. The explanatory memorandum says these clauses provide for amendments to the Public Works Act. The former Department of Contract and Management Services construction contracting is to be done in the name of the minister for works or his delegate. Nothing in clauses 395 to 397 refers to that. I do not understand what is the reference to that. I do not understand why the Bill allows for the flexibility and merging of construction contracting. The definition of “public work” is to include public housing. That is the simple element of it. There is obviously a lot more behind it than meets the eye.

Mr J.C. KOBELKE: I am advised that there is no more behind it.

Mrs C.L. Edwardes: It is just a confusing explanation.

Mr J.C. KOBELKE: The advice from the department, which is the expert in this area, is that “public housing” has developed its own legal definition and use; therefore, there is a need for this provision. This provision is included on the advice of the department that there was a need for a differentiation between “public work” and “public housing”. It has been drawn to my attention that we are dealing with the Public Works Act 1902. Given the changes that have taken place over the past 100 years, the Government assumes that this provision is part of that historic nature to fit in with that.

Mrs C.L. Edwardes: I do not have a problem with that. I wondered why in the explanatory memorandum it has been necessary to explain the fact that construction contracting is to be done in the name of the minister for works or his delegate and is to include “public housing” to allow flexibility in merging construction contracting. Why is that? Does one contractor do schools and another public works?

Mr J.C. KOBELKE: The general construction that is considered to be public work is done through the minister for works. However, for its own management reasons, the department has convinced the Government that the department needs to have a separate recognition of public housing.

Mrs C.L. Edwardes: In order to do the one contract?

Mr J.C. KOBELKE: If the one contract included public works and public housing, this provision would enable that to take place.

Clause put and passed.

Clauses 397 to 440 put and passed.

Clause 441: Section 3 amended -

Mrs C.L. EDWARDES: I refer to this clause because I am not sure that many members fully understand the difference between “public servants” and/or “public sector employees”. The amendment will allow either public servants or public sector employees who are licensed surveyors to be employed as authorised land officers. Will the minister tell members the difference between public servants and public sector employees?

Mr J.C. KOBELKE: A public servant is someone who is employed under the Public Sector Management Act, of which there are about 20 000. Through negotiations, other people are covered by the Civil Service Association of Western Australia. Public sector workers are employed under a range of statutes and include, for example, teachers and police officers. They are employed under those specific industry sectors, not under the Public Sector Management Act. I understand that about 70 000 people fall into that category.

Clause put and passed.

Clauses 442 to 486 put and passed.

New clauses 487 and 488 -

Leave was granted for the following new clauses to be moved together.

Mr J.C. KOBELKE: I move -

Page 195, after line 22 - To insert the following -

Division 2 - *Economic Regulation Authority Act 2003*

487. The Act amended

The amendments in this Division are to the *Economic Regulation Authority Act 2003**.

[**Act No. 67 of 2003.*]

488. Section 23 amended

Section 23(2) is amended as follows:

- (a) by deleting “and” in the second place where it occurs;
- (b) by inserting after “function of the Authority” -
and need only be complied with to the extent practicable

These new clauses are consequential to the changes made to the *Economic Regulation Authority Act 2003*.

New clauses put and passed.

Clauses 487 to 505 put and passed.

Clauses 506 and 507 put and negatived.

Clauses 508 to 535 put and passed.

Title put and passed.