

ARSON LEGISLATION AMENDMENT BILL 2009

CLAUSE NOTES

Part 1 – Preliminary

Clause 1. Short title

Provides for the Act to be cited as the *Arson Legislation Amendment Act 2009*.

Clause 2. Commencement

The Act comes into operation on a day to be fixed by proclamation.

Part 2 – *Bush Fires Act 1954* amended

Clause 3. Act amended

Amendments in this Part are to the *Bush Fires Act 1954*.

Clause 4. Section 32 amended

The maximum penalty for an offence under section 32 is increased from a \$250 000 fine and 14 years imprisonment to 20 years imprisonment.

A cross-jurisdictional analysis of other Australian jurisdictions demonstrates that currently all but three jurisdictions have a greater maximum term than Western Australia for similar offences. Consistent with the range of sentences in Western Australia, 20 years imprisonment is the appropriate maximum offence.

The reference to a fine in section 32 has also been deleted with reliance placed on the Court's ability to impose a fine under section 41(5) of the *Sentencing Act 1995* if the Court feels it is appropriate.

Part 3 – *The Criminal Code* amended

Clause 5. Act amended

Amendments in this Part are to *The Criminal Code*.

Clause 6. Section 23A amended

Amends section 23A, "Unwilled acts and omissions", so that it is subject to the duty imposed by section 444A.

Clause 7. Section 23B amended

Amends section 23B, "Accident", so that it is subject to the duty imposed by section 444A.

Clause 8. Section 266 amended

Following the fatal Victorian bushfires of February this year there was concern, expressed at the April meeting of the Standing Committee of Attorneys General, that homicides caused by deliberately lit bushfires would not fall within the recognised homicide offences.

Section 266, therefore, is amended to make it clear that a source of ignition or a fire is a dangerous thing. Section 266 currently reads as follows:

It is the duty of every person who has in his charge or under his control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.

Consequently, by amending section 266 to define "anything" as including a source of ignition or fire, makes it clear and unambiguous that fires are a dangerous thing. Therefore, persons, who fail to take reasonable care or reasonable precautions when in charge of a source of ignition or fire, will be held to have caused any consequences to the life and safety of others which results from the failure to take reasonable care or reasonable precautions.

Further, amending section 266 in this way ensures the *Criminal Code* is consistent in its protection of property and persons in relation to arson.

Clause 9. Chapter XLV heading amended

The heading in Chapter XLV is changed from "Definitions to "Preliminary Matters" to reflect the insertion of section 444A, which imposes a duty, rather than defines a term.

Clause 10. Section 444A inserted

Subsection (1) imposes a duty on a person to use reasonable care and take reasonable precautions when in charge of a source of ignition and to avoid lighting a fire that may destroy or cause damage to property. If property or

damage is destroyed, the person is held to have caused that destruction or damage.

Subsection (2) imposes a duty on a person to use reasonable care and take reasonable precautions when in charge of a fire so that it does not destroy or cause damage to property. If property or damage is destroyed, the person is held to have caused that destruction or damage.

Subsection (3) notes that a person does not breach a duty imposed by subsections (1) and (2) if the fire does not spread beyond the capacity of the person to extinguish it.

Subsection (4) makes it clear that property which is capable of being destroyed or damaged by fire includes vegetation.

It was also considered whether the phrase "whether or not on Crown land" following "Property that is capable of being destroyed or damaged by fire includes vegetation" was a necessary and desirable amendment.

The concern over whether "property" includes bushland on Crown land arose in the context of section 32 of the *Bush Fires Act 1954*. In lower courts, an argument has occasionally been run, with some success, that fire which threatens or damages bushland on Crown land does not threaten or damage "property" in section 32. The legal correctness of such an analysis was, however, criticised by President Steytler, as he then was, in *Spooner v Western Australia* [2008] WASCA 86 (*Spooner*). At paragraph 10 President Steytler made the following comment:

"It seems, from the transcript, that the trial was conducted upon the assumption that the word 'property' referred to in s 32(a) of the Act does not encompass bushland. That is a debatable proposition, given that any bushland is either publicly or privately owned and the word 'property' (which is not defined in the Act) prima facie encompasses anything that is capable of ownership: see the Shorter Oxford English Dictionary definition and the definition in s 1 of the Criminal Code (WA)" (para. 10).

The comments of President Steytler are consistent with the decision of La Jackson DCJ in *R v Guthrie* [2003] WADC 167, which also considered the interpretation of "property" in the *Bush Fires Act 1954*. After considering the definition of property in the Shorter Oxford English Dictionary, La Jackson DCJ, at paragraph 10, stated the following:

"Crown land is vested in the Crown. It is therefore owned by the Crown. The owner of land owns anything growing on the land. It follows for the purpose of the dictionary definition that bush in the reserve is property."

The dispute over the scope of the term "property" in section 32 of the *Bush Fires Act 1954* can be largely attributed to the lack of a definition of "property" in the *Bush Fires Act 1954*. The lack of definition provides the ambiguity and scope to argue that "property" does not include bushland on Crown land. However, "property" is defined by section 1(1) of the *Criminal Code* as including "real and personal property and everything, animate or inanimate, capable of being the subject of ownership". As noted by President Steytler in *Spooner*, any bushland is either publicly or privately owned, and is therefore property. Therefore, although there may have been some ambiguity as to the scope of the term "property" in the *Bush Fires Act 1954*, such ambiguity does not arise in the *Criminal Code* and consequently the inclusion of "whether or not on Crown land" does not add any substance to the definition of property and is otiose.

Further, the inclusion of "whether or not on Crown land" may have unintended consequences given the consistent use of the term "property" throughout the *Criminal Code*. The *Criminal Code* does not distinguish between public and private owners of property. Therefore, the inclusion of "whether or not on Crown land" has the potential to create an ambiguity that where there is no express statement of application to Crown land, the property referred to could merely refer to privately held property. For example, in relation to section 445 of the *Criminal Code*, "Criminal damage", it arguably becomes ambiguous whether or not the offence is intended to apply to private and public property.

Accordingly, the inclusion of "whether or not on Crown land" was considered unnecessary and inappropriate.

Clause 11. Section 444 amended

The maximum penalty for an offence under section 444 is increased from 14 years, or 20 years if the offence is committed in circumstances of racial aggravation, to life imprisonment. This is consistent with maximum penalties in Queensland, South Australia, Tasmania and the Northern Territory for similar offences.

The clause also makes it certain that property capable of being destroyed or damaged by fire includes vegetation.

Clause 12. Section 445A inserted

This section makes it an offence to breach the duty imposed on persons in section 444A and imposes a maximum penalty of 15 years imprisonment.

The combined operation of sections 444A and 445A seeks to cover the range of behaviours prescribed by section 4.1.8 of the *Model Criminal Code*. As the element of intention in section 4.1.8 of the *Model Criminal Code*, recklessness, has no correlation in *The Criminal Code* it was

necessary to impose a duty of care in regards to fire and ignition sources to insert an offence intended to proscribe the same range of behaviours.

Although the period of 15 years imprisonment is not entirely consistent with other provisions in *The Criminal Code*, it is retained from section 4.1.8 to ensure consistency with the *Model Criminal Code*.

Section 445A does overlap to a certain extent with section 32 of the *Bush Fires Act 1954*. However, such overlap is intended as the offences have slightly different elements, and a different sentencing range, giving the Office of the Director of Public Prosecutions some flexibility when prosecuting bushfire offences.