ABORIGINAL INTESTATE ESTATES LEGISLATION AMENDMENT BILL 2012

Second Reading

MR B.S. WYATT (Victoria Park) [4.10 pm]: I move —

That the bill be now read a second time.

The Aboriginal Intestate Estates Legislation Amendment Bill 2012 seeks to amend a number of pieces of legislation in respect of how we treat the assets of Aboriginal people who pass away without a will. The primary amendments contained in the bill are in respect of part 2 of the Aboriginal Affairs Planning Authority Act 1972. The bill also seeks to make amendments to the Administration Act 1903, the Unclaimed Money Act 1990 and the Aboriginal Affairs Planning Authority Act Regulations 1972. The laws of succession govern the distribution of property upon death and include laws relating to wills, intestacy, administration of the estates of deceased persons and family provision. As pointed out by the Law Reform Commission of Western Australia's final report into Aboriginal customary law —

> In traditional Aboriginal society the ownership of property and the right to trade, exchange, pass on, will or gift such property were governed by certain rules. These rules or laws varied from tribe to tribe (or group to group); however, in most cases the range of things that could be personally owned in traditional Aboriginal society (and therefore passed on after death) was restricted under Aboriginal customary law. For example, land and permanent natural resources were inalienable and belonged communally to the tribe or clan. Songs, sacred emblems, designs and dances were also generally communally owned and apart from the necessary hunting and gathering implements, people had few personal possessions.

The bill seeks to amend the laws of succession when Aboriginal people pass away without a will. In Western Australia, where a non-Aboriginal person dies without a valid will, part II of the Administration Act 1903 provides for the order of distribution of the deceased's property. However, in respect of most Aboriginal people in Western Australia, a separate statutory distribution regime applies to the intestate deceased estate.

In respect of the current statutory regime, the separate statutory regime relating to the distribution of property of an Aboriginal person who passes away intestate was discussed at length in the Law Reform Commission of Western Australia's discussion paper on "Aboriginal Customary Laws" and is found in the Aboriginal Affairs Planning Authority Act and the AAPA regulations. These legislative provisions apply only to persons of Aboriginal descent, which is defined in section 33 of the AAPA act as "of the full blood descended from the original inhabitants of Australia or more than one-fourth of the full blood".

Section 34 of the AAPA Act stipulates that if an Aboriginal person leaves a will then the estate will be distributed according to the terms of that will. However, where there is no will, or no valid will, distribution of the estate is administered under the statutory scheme in the following way. First, upon the death of an intestate Aboriginal who meets the qualification requirements of section 33 of the AAPA act, the property of the deceased is vested in the Public Trustee who undertakes the administration of the estate and distribution of the property to persons entitled under the intestacy provisions of the Administration Act. Second, if no person entitled under the Administration Act can be ascertained and the deceased was not married pursuant to the commonwealth Marriage Act 1961, the estate is distributed to those persons entitled under the AAPA regulations. These regulations purport to "so far as that is practicable, provide for the distribution of the estate in accordance with the Aboriginal customary law as it applied to the deceased at the time of his death". Pursuant to regulation 9 the measure of entitlement to, and order of distribution of, an intestate Aboriginal estate is: where the deceased was male, his customary law wife or wives, but only if there was a child or children of the union/s, in equal shares; where the deceased was female, her customary law husband, regardless of whether they had children, the whole estate; the children of a traditional marriage, in equal shares; the deceased's father "by reason of a tribal marriage", the whole estate; and the deceased's mother "by reason of a tribal marriage", the whole estate. Third, if no valid claim is made on the estate within two years of the intestate's death and no person entitled under the AAPA regulations can be ascertained, provision is made for the estate to be beneficially invested to a person or persons who have a "moral claim" over the estate. Such claims must be made by application supported by evidence to the Public Trustee and may only be approved by the Governor. Fourth, if there is no approved moral claim on the estate, the estate will be vested in the Aboriginal Affairs Planning Authority to be held in trust for the benefit of "persons of Aboriginal descent".

History of the current statutory regime: The removal of the ability of Aboriginal people to control their own assets dates back to the infamous Aborigines Act 1905. Section 33 of the Aborigines Act gave to the Chief Protector the power to "undertake the general care, protection, and management of the property of any aboriginal or half-caste". Although this section did not specifically deal with the laws of succession, it did provide the Chief Protector with the power to "take possession of, retain, sell, or dispose of any such property, whether real or

personal" and to "exercise in the name of an aboriginal or half-caste any power which the aboriginal or half-caste might exercise for his own benefit".

The Aborigines Act was amended by the Aborigines Act Amendment Act 1936, which introduced a new section 33A to the Aborigines Act. This amendment introduced the precursor to the current statutory regime in respect of Aboriginal intestate estates. Section 33A(2) dealt specifically with intestate estates and stipulated that —

> ... all property and rights of property vested in any native other than a native exempted from the provisions of this Act who dies intestate shall vest in the Commissioner upon trust to pay the just debts of the deceased and to distribute the balance between the widow or husband of the deceased and/or the next of kin, if the same or some of them can be ascertained, according to the laws of the State, in accordance with and in the manner prescribed for the administration of the estates of persons dying intestate by the Administration Act 1903.

In 1963 a further amendment to the laws of Aboriginal intestate estates was made by way of the Native Welfare Bill. This bill removed the responsibility to deal with the Aboriginal intestate estates from the Commissioner of Native Welfare and gave it to the Public Trustee.

Finally, the Aboriginal Affairs Planning Authority Bill, introduced into the Parliament in 1971, repealed the Native Welfare Act 1963 "as a preliminary step to absorbing the welfare activities of the Native Welfare Department into a new and more comprehensive department to be known as the Department of Community Welfare." During the second reading speech, Hon W.F. Willesee stated —

> Although the new legislation repeals the Native Welfare Act it is considered that certain of the existing provisions should be retained by the planning authority. Some of these are the special provisions for the distribution of an estate of an Aboriginal person who dies intestate. Briefly, if the Public Trustee is unable to ascertain who is entitled to benefit under the normal laws of the State, any balance remaining may be distributed in accordance with the Aboriginal customary law as it applied to the deceased at the time of his death. Where there appear to be no persons entitled to succeed, the balance may, by order of the Governor, be distributed beneficially amongst any persons having a moral claim to it.

Criticisms of the current statutory regime: The discussion paper released by the Law Reform Commission of Western Australia outlined the long line of criticisms of the current statutory scheme for distribution of property of an Aboriginal intestate deceased. First, the difficulty for the Public Trustee of applying the requirement of the scheme to an Aboriginal person of at least "one-fourth of the full blood" and the perverse result of a person who is less than "one-fourth of the full blood" but who has lived with, and identifies with, a particular Aboriginal community, will have his or her property distributed according to the Administration Act rather than the AAPA act. Second, the fact that the Administration Act does not recognise traditional customary law marriages and places emphasis on lineal blood relationships rather than on classificatory kin relationships. Third, as section 35 of the AAPA act requires that the Public Trustee administer all qualifying intestate Aboriginal estates, this denies Aboriginal people the right to administer the estates of deceased family members. Not only is this likely to be in breach of the commonwealth Racial Discrimination Act 1975, it means that an extra cost burden is effectively imposed on the intestate estates of Aboriginal people whose estates are then required to meet the administration fee of the Public Trustee. At the time of the discussion paper this fee was 4.4 per cent of the value of the estate if it is between $2 000 and $200 000. Fourth, the definition of "Aboriginal" may be in breach of section 10 of the Racial Discrimination Act 1975. Fifth, the use of antiquated "protection era" terminology in section 33 is deeply offensive to Aboriginal people. Sixth, many Aboriginal people born before 1970 do not have their births registered and therefore may be unable to satisfactorily prove their entitlement to an intestate estate. Seventh, difficulties can arise in respect of kin names. For example, a person considered a "mother" in Aboriginal society might not be understood as a deceased's "mother" under the Administration Act. Eighth, many Aboriginal families were broken up as a result of the policies of the stolen generation which creates problems in proving entitlement. In many cases it is necessary for the Public Trustee to hire a genealogist to prove a claim. This process is lengthy and expensive and may substantially diminish the estate.

Moral claims: The Bill deletes section 35 of the AAPA act in its entirety. This will see the deletion of section 35(3) in respect of "moral claims". As pointed out in the Law Reform Commission discussion paper —

> … a moral claim is made upon application to the Public Trustee pursuant to s35 of the AAPA Act. A moral claim may be made by a person who has, for instance, had primary care for the deceased throughout his or her life or, perhaps, by someone who is in a special classificatory relationship with the deceased'.

The procedure for making "moral claims" is found in regulation 9, subregulations (5) and (6), of the AAPA regulations. These stipulate that an application must be made to the Public Trustee, who is required to cause the

claim to be investigated and report in writing to the Minister of Indigenous Affairs. The Minister then makes a recommendation to the Governor in respect of the order that should be made in relation to the moral claim.

Whilst the submission from the Public Trustee to the Law Reform Commission urged that the moral claims provision should be retained, and pointed out that such "moral claims" are regularly made and approved, the bill will see the abolition of the avenue of "moral claims" over the property of an Aboriginal intestate estate.

Whilst the Opposition sees merit in retaining the "moral claims" as part of the AAPA act, albeit with the amendments as recommended by the Law Reform Commission of Western Australia, the opposition has, in the interests of securing government support of the passage of this bill, taken note of the government's policy decisions in respect of other classificatory relationships.

The Inheritance (Family and Dependants Provision) Amendment Bill 2007, introduced by the then Attorney General, Hon J. A. McGinty, sought to recognise Aboriginal kinship relationships as recognised under the customary law of the deceased. Whilst this bill passed the Legislative Assembly, it did not complete its passage through the Parliament due to the general election in September 2008. Whilst the Liberal Party at the time voted in support of recognition of Aboriginal kinship relationships, when the bill was subsequently reintroduced into the Parliament as the Inheritance (Family and Dependants Provision) Amendment Bill 2011, the recognition of Aboriginal kinship relationships had been specifically removed by the current Liberal–National government. This removal was the subject of debate during the passage of the second bill through the Legislative Council, and the Parliamentary Secretary to the Attorney General, Hon Michael Mischin, advised the Legislative Council that the absence of recognition of Aboriginal kinship relationships "was a policy decision" of the Liberal–National government.

It is clear that "moral claims" as stipulated under the AAPA act attempt to capture such kinship relationships under Aboriginal customary law. It is the opposition's view that such recognition is worthy and important but, in the interests of securing the government's support in rectifying a broader flaw in the AAPA act, the opposition has specifically removed the entirety of section 35 of the AAPA act.

In any event, the amendments contained in the Inheritance (Family and Dependants Provision) Amendment Bill 2011 and the inclusion of section 4A into the Administration Act 1903 by the current bill means that the number of any potential "moral claims" is likely to be captured by the current law and the proposed amendments contained in the bill.

Amendments to the Administration Act 1903: The bill seeks to bring into the Administration Act 1903 relationships as recognised by the customary law of an Aboriginal person. This is not controversial and, indeed, confirms the amendments made by the Parliament in the Aborigines Act Amendment Act 1936. Such relationships are currently recognised pursuant to regulation 9 of the AAPA regulations.

Conclusion: Whilst this amendment is simple in its drafting, and the number of Aboriginal people who are impacted on by the current statutory regime is small, it is a reform that is well past due. In response to questions during budget estimates this year, the Parliamentary Secretary representing the Minister for Indigenous Affairs stated —

> As of November 2011, 98 Aboriginal estates were being administered by the Public Trustee. For 2010–11, the Pubic Trustee received 47 new Aboriginal estates. Approximately $568 000 was held in trust at that time by the Public Trustee as a result of the Aboriginal Affairs Planning Authority Act. The funds that revert to the Department of Indigenous Affairs from the Public Trustee pursuant to the act apply to subsidised funeral expenses for Aboriginal people. The Department of Indigenous Affairs has subsidised 36 funerals at a total of $16 392 for the period July 2011 to April 2012.

The amendments contained in the bill are minimal and do not incorporate all the recommendations made by the Law Reform Commission of Western Australia. The minimalist approach that the opposition has taken to this bill is a deliberate decision, as we have also taken into consideration other relevant policy decisions taken by the government in the hope that the government is able to support the passage of this bill. I sincerely hope that the government finds favour with the bill and votes for its passage.

Finally, it is important to note that in no other jurisdiction in Australia does such a statutory regime exist to specifically treat Aboriginal intestate estates differently. It is time to correct a practice that finds its origin in a time during which Aboriginal people were treated so intolerably.

I commend the bill to the house.

Debate adjourned, on motion by **Mr D.A. Templeman**.