# Courts Legislation (Amendment) Bill.

**Second Reading**

**Mr PHOTIOS** (Ermington - Minister for Multicultural and Ethnic Affairs, and Minister Assisting the Minister for Justice) [10.7]: I move:

That this bill be now read a second time.

This bill seeks to make a series of amendments to various Acts affecting the powers of and procedures in some of our courts. It deals principally with civil jurisdictions. If it could be summed up, it would be described as a bill to remove several fairly minor hindrances to the more efficient operation of the courts. Most of its provisions have been sought by the courts themselves. I will deal with the provisions generally in the order in which they appear in the schedules to the bill. Schedule 1 will amend the Local Court (Civil Claims) Act 1990. The Local Court has a general civil jurisdiction of up to $40,000 and it is important to the efficient functioning of the civil court system that actions within the jurisdiction of the Local Court be litigated there. As honourable members would be aware, one problem has been the inability of the Local Court to order the return of goods wrongly detained.

In an action in detinue in a Local Court a judgment for the plaintiff can be only for payment of money and, when the defendant pays the value of the goods, they become his or hers. The defendant can be given the option of returning the goods but cannot be compelled to return them. Item (1) of schedule 1 will give the Local Court jurisdiction to hear a claim for specific return. It then goes on to tidy up the drafting by recasting section 12, which is the major statement of the court's jurisdictional rights. Item (3) will give the Local Court the powers of the District Court to make orders for specific return and allows the court rules to provide for enforcement.

Another problem in keeping actions in the Local Court has been the unavailability of a defence under the Contracts Review Act 1980. Section 7(1)(a) of that Act enables the Supreme Court and the District Court to refuse to enforce a provision of a contract if the court finds that the provision, which is enforceable under general law, is unjust in the circumstances.
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The Act does not apply to the Local Court, and a defendant who wants to rely on section 7(1)(a) in a Local Court action has to apply to the District Court to transfer the action there. Quite a few applications are being made on this basis, and it is suspected that at least some of them are spuriously made as a delaying tactic. Item (2) will give the Local Court the powers of the Supreme Court to grant relief under section 7(1)(a), but is careful not to extend any other provision of the Contracts Review Act to the local courts. Most of those other provisions involve equitable relief.

The Local Courts (Civil Claims) Act is far too specific in detailing the provisions and procedures relating to the financial examination of a judgment debtor. Because of the way the Act is worded, registrars are being compelled to conduct examinations in circumstances where it would be quite reasonable to insist on the creditors doing the work themselves. Registrars are very busy people, and it is inappropriate that the taxpayer should foot the bill for saving the creditor from having to attend the court when the creditor could quite easily do so. The District Court has a much more reasonable system, which is achieved by leaving it to the court to make rules about when a creditor may or may not require the registrar to conduct an examination. Items (5) and (7) of schedule 1 will bring the position in the Local Court into line with that in the District Court.

Where a judgment debtor fails to attend a Local Court as required by an examination summons duly served, the registrar is required by the Act to report the failure in writing to the court. The magistrate can then direct adjournment of the proceedings or the issue of a warrant for the apprehension of the judgment debtor. This warrant requires the sheriff to arrest the debtor and to bring him or her before the nearest registrar for examination. It does not authorise imprisonment of the debtor except in the very rare case where an arrest is made at a time when no registrar is available. Almost invariably the magistrate authorises the warrant to issue, and makes this decision without any knowledge of the matter other than the registrar's report.

There is no point in taking up the time of the court with what can only be described as a routine matter, or in accepting the delay the process causes in some remote areas where the capacity is generally not available. Item (6) of schedule 1 will enable the registrar to exercise the functions of the court to adjourn the examination or issue the warrant for apprehension. Section 61 of the Local Courts (Civil Claims) Act prohibits the seizure of property under a Local Court writ of execution between 8 p.m. and 7 a.m. No other court has anything resembling such a restriction on its process. The origin of the provision has been traced as far back as the Small Debts Recovery Act 1846, but there is nothing to indicate why it is needed in 1993 in a court with a jurisdiction of up to $40,000. Sheriff's officers do not execute a large number of writs at night, but there are occasions when a levy simply cannot be made except at night. Item (8) of schedule 1 will therefore repeal section 61. Items (9) and (10) deal with transitional matters.

Schedule 2 will amend the District Court Act 1973. Item (1) of schedule 2 will make the same provision for issue by the

registrar of a warrant for apprehension as is made in schedule 1 in respect of the Local Court. Item (2) of schedule 2 will deal with a problem concerning orders for costs made in the District Court. In a recent decision the Court of Appeal held, by majority, that the District Court has no power to order costs to be taxed on an indemnity basis. The reason for this decision was that the definition of costs in the District Court Act was interpreted as restricting the court's powers to dealing with costs to be taxed on a party and party basis. Item (2) seeks to lift that restriction.

Very broadly, the distinction between the two types of costs order is that party and party costs are limited to the costs necessarily incurred in establishing the successful party's case, and further limited by prescribed scales. Indemnity costs include all the costs actually incurred by the successful party other than those unreasonably incurred or unreasonable in amount, and any doubt about the reasonableness is to be resolved in favour of the successful party. The difference in amount can be quite substantial. An indemnity costs order is punitive in nature and is made only where a party's unreasonable conduct of the proceedings has prolonged them or otherwise added to their cost. Such orders are not infrequently made in the Supreme Court, and the Court of Appeal in its judgment thought it highly desirable that they should be able to be validly made in the District Court.

The particular concern in the District Court has been with plaintiff's offers under the offer of compromise system. That system has been of great assistance in promoting early settlements. Where a plaintiff makes an offer to accept a specified amount in satisfaction of his claim, the defendant rejects the offer, the proceedings continue to judgment and the plaintiff recovers the amount of his offer or more, it is usually clear that the defendant's rejection has unnecessarily prolonged the proceedings. The plaintiff in such a case would seek and be granted an order that his costs incurred after the date of the offer be paid on the indemnity basis, and the District Court Rules provide for this.

Quite a number of orders for indemnity costs have been made in the District Court and, having been won, they would have been found appropriately under the amendments proposed here in a way that would be very satisfactory to the resolution of the case in question. Accordingly, with community consultation, they have now been incorporated in the bill. They were orders made on the merits of the case and in accordance with the rules of the court, and the court's understanding of its powers and the parties who were granted those orders should be protected.

Item (2) of schedule 2 will seek to validate those orders by providing that the court has had power to make them since 28th April, 1989, which was the date of commencement of the offer of compromise system. As is usual in such circumstances, the validation will
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not affect the particular matter that was before the Court of Appeal. When the Legal Profession Reform Bill becomes law its new approach to costs will supplant the present system, and there will be no doubt about the court's power to award indemnity costs. But the provisions of that bill and this bill cannot stand together, so the latter provisions are expressed to be repealed on commencement of the former. It is not practicable to leave the present problem to be solved by the Legal Profession Reform Bill, because there will be necessarily a good deal of delay between assent to that bill and commencement of the relevant provisions.

The definition of costs which provoked the proceedings in the Court of Appeal is repeated in the Compensation Court Act 1984 and the Local Courts (Civil Claims) Act, 1970, and it is necessary to make the same amendments to those Acts as to the District Court Act. The bill will attend to those matters in schedule 4 and in item (4) of schedule 1. The District Court Act makes extensive provision for the court to make orders for inspection of property in proceedings in the civil jurisdiction, but there is no provision at all in respect of the criminal jurisdiction. Serious doubt exists as to whether the court can order, for example, a view by a jury in criminal proceedings.

The Supreme Court relies on its inherent powers in this area, and item (3) of schedule 2 will allow the District Court to make rules conferring those powers on the District Court, but limited to orders for a view of real property. For caution, any such rules are included among those criminal procedure rules which need the approval of the Attorney General before they can have effect. Schedule 3 will amend the Contracts Review Act 1980 to include Local Courts in the definition of court, but only for the purposes of section 7(1)(a) of the Act. It complements item (2) of schedule 1.

Schedule 4, as I have mentioned, clarifies the power of the Compensation Court to order indemnity costs. Schedule 5 applies the Supreme Court (Fees and Percentages) Regulation to the Dust Diseases Tribunal. That tribunal was established in 1989 to take exclusive jurisdiction over the proceedings for damages for dust related injuries which were then brought mostly in the Supreme Court. The Dust Diseases Tribunal Act 1989 provided for regulations to be made as to fees in the Tribunal, but none was made. The tribunal has been charging the same fees as are charged in the Supreme Court, which was always the intention; but it now becomes necessary to validate those charges. The amendment will continue the application of the Supreme Court charges until regulations are in fact made under the Dust Diseases Tribunal Act.

The various amendments to be made by the bill will assist the courts in their endeavours to provide an efficient dispute resolution service to the citizens of this State. The Government again congratulates the courts on the very impressive progress they are making, especially in generating a number of these ideas that we hope will enjoy bipartisan support. The Government is glad to bring forward legislation that was sought by the courts to remove a few barriers to that progress. I commend the bill.

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