

This explanatory note relates to this Bill as introduced into Parliament.

#### Overview of Bill

A vexatious litigant is a person who frequently and persistently seeks to commence legal action without reasonable grounds or for improper purposes. Vexatious litigants often repeat arguments that have already been rejected, disregard the practices and rulings of courts and tribunals or persistently attempt to abuse legal processes. Actions taken by vexatious litigants can often result in the waste of public resources, the harassment of defendants in litigation and the incurring of unnecessary costs.

Section 84 of the Supreme Court Act 1970 currently enables the Supreme Court to make orders to prevent litigants from continuing or instituting vexatious proceedings in the Supreme Court or in any other court of the State. However, the Supreme Court may only make such an order if it is satisfied that the litigant has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings in the courts of the State. In determining whether this test is satisfied, the Supreme Court is limited to examining action taken by a litigant in the State.

Section 70 of the Land and Environment Court Act 1979 confers a comparable power on the Land and Environment Court in relation to vexatious proceedings instituted in that Court.

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The objects of this Bill are:

(a) to enact provisions (which are largely based on model provisions developed by the Standing Committee of Attorneys-General) that expand the power of the Supreme Court to make orders restricting proceedings by vexatious litigants, including provisions that enable the Court:

(i) to make such orders if satisfied that a litigant has frequently instituted or conducted vexatious proceedings, and

(ii) to make such orders against persons acting in concert with vexatious litigants, and

(iii) to make such orders in relation to proceedings instituted or conducted by litigants in tribunals as well as in courts, and

(iv) to take into account, when making such orders, conduct in the courts and tribunals of other Australian jurisdictions, and

(b) to confer comparable powers on the Land and Environment Court in relation to vexatious litigants in that Court and on the Industrial Court in relation to vexatious litigants in the Industrial Relations Commission, and

(c) to repeal section 84 of the Supreme Court Act 1970 and section 70 of the Land and Environment Court Act 1979 and to make provision for matters of a savings and transitional nature consequent on the repeal of those sections.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day to be appointed by proclamation.

Clause 3 defines certain words and expressions used in the proposed Act.

Clause 4 defines the term proceedings for the purposes of the proposed Act. The definition encompasses both civil and criminal proceedings before the courts and tribunals of the State.

Clause 5 provides for when proceedings are instituted for the purposes of the proposed Act.

Clause 6 defines the term vexatious proceedings to include:

(a) proceedings that are an abuse of the process of a court or tribunal, and

(b) proceedings instituted to harass or annoy, to cause delay or detriment, or for another wrongful purpose, and

(c) proceedings instituted or pursued without reasonable ground, and

(d) proceedings conducted in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.

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Clause 7 provides that the proposed Act does not limit or otherwise affect the inherent jurisdiction or powers of courts and tribunals apart from the proposed Act to restrict vexatious proceedings before them.

Part 2 Vexatious proceedings orders

Clause 8 enables certain courts to make orders (vexatious proceedings orders) restricting a vexatious litigant or a person acting in concert with such a person from continuing or instituting legal proceedings. The courts that will be able to make such orders (authorised courts) are the Supreme Court, the Land and Environment Court and the Industrial Court.

In making a vexatious proceedings order, an authorised court must be satisfied that a litigant has brought vexatious proceedings on a frequent basis or that a person is acting in concert with such a litigant. This test for determining when to make a vexatious proceedings order is less onerous than the current test which requires a court to be satisfied that a person has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings.

In determining whether to make a vexatious proceedings order against a person, an authorised court can consider all legal actions instituted or conducted, and all orders made, in Australia. This includes actions instituted or conducted and orders made prior to the commencement of the proposed section.

An authorised court will be able to make a vexatious proceedings order of its own motion or on the application of any of the following persons:

(a) the Attorney General,

(b) the Solicitor General,

(c) the appropriate registrar for the court,

(d) a person against or in relation to whom another person has instituted or conducted vexatious proceedings,

(e) a person who, in the opinion of the court, has a sufficient interest in the matter.

The kinds of vexatious proceedings orders that an authorised court will be able to make will depend on the court making the order. The Supreme Court will have the most extensive powers. It will be able to make any of the following orders in relation to a person:

(a) an order staying all or part of any proceedings in New South Wales already instituted by the person,

(b) an order prohibiting the person from instituting proceedings in New South Wales,

(c) any other order that the Court considers appropriate in relation to the person.

The Land and Environment Court will have comparable powers, but limited to restricting proceedings in that Court. Similarly, the Industrial Court will have power to make orders restricting proceedings in the Industrial Relations Commission (whether in Court Session or otherwise).

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Clause 9 enables an authorised court, by order, to set aside or vary a vexatious proceedings order that it has made.

Clause 10 enables an authorised court, by order, to reinstate a vexatious proceedings

order it has set aside that prohibited a person from instituting proceedings if satisfied that, within 5 years of the vexatious proceedings order being set aside, the person has:

- (a) instituted or conducted vexatious proceedings in an Australian court or tribunal, or

- (b) acted in concert with another person who has instituted or conducted vexatious proceedings in an Australian court or tribunal.

Clause 11 provides for the publication of certain orders made under the proposed Act. Any such orders are to be recorded in a publicly available register and published in the Gazette.

#### Part 3 Particular consequences of vexatious proceedings orders

Clause 12 provides for the authorised courts (an appropriate authorised court) that may grant leave to institute proceedings that would otherwise be prohibited by a vexatious proceedings order. An appropriate authorised court is:

- (a) the authorised court that made the vexatious proceedings order, and

- (b) in the case of a vexatious proceedings order made by the Supreme Court that operates to prohibit proceedings being instituted in the Land and Environment Court—the Land and Environment Court, and

- (c) in the case of a vexatious proceedings order made by the Supreme Court that operates to prohibit proceedings being instituted in the Industrial Relations Commission (whether in Court Session or otherwise)—the Industrial Court.

Clause 13 provides for the consequences when an authorised court makes a vexatious proceedings order prohibiting a person from instituting proceedings. The person will not be able to institute proceedings unless an appropriate authorised court grants leave for the proceedings to be instituted. A failure to obtain such leave before instituting proceedings will result in a stay of the proceedings and, ultimately, in the dismissal of the proceedings. If there is any doubt, the authorised court, or the court or tribunal in which the proceedings are instituted, can declare that the proceedings are subject to the proposed section and can make any other appropriate order.

Clause 14 provides for how applications for leave to institute proceedings are to be made. An applicant must file an affidavit with the application. The content of the affidavit is set out in the proposed section. An applicant cannot appeal a decision to dismiss the application and not to grant leave.

Clause 15 sets out the circumstances in which an appropriate authorised court can dismiss an application for leave to institute proceedings. The court must dismiss the application if the affidavit required in support of the application does not

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substantially comply with the application requirements, the proceedings are vexatious or there is no prima facie ground for the proceedings.

Clause 16 sets out the circumstances and process by which an application for leave to institute proceedings can be granted by an appropriate authorised court. The applicant is to serve the proposed defendant or respondent, and the other listed persons. All such relevant persons have an opportunity to be heard at the hearing for the application for leave. The court can grant leave only if satisfied that the proceedings are not vexatious and that there are one or more prima facie grounds for the proceedings.

#### Part 4 Miscellaneous

Clause 17 enables an authorised court to make orders prohibiting or restricting the disclosure, publication or broadcast of evidence and certain other information arising in proceedings under the proposed Act if it considers it necessary to do so in order to protect the welfare of a person or for any other reason.

Clause 18 enables the Governor to make regulations for the purposes of the

proposed Act.

Clause 19 enables rules of court to be made for the purposes of proceedings under the proposed Act.

Clause 20 is a formal provision that gives effect to the savings, transitional and other provisions set out in Schedule 1.

Clause 21 is a formal provision that gives effect to the amendments to the Acts set out in Schedule 2.

Clause 22 provides for the review of the proposed Act in 5 years.

Schedule 1 Savings, transitional and other provisions

Schedule 1 contains savings, transitional and other provisions consequent on the enactment of the proposed Act. In particular, it enables pending applications for orders against vexatious litigants to be dealt with under existing provisions and provides for existing orders against vexatious litigants to continue to have effect as such under the proposed Act.

Schedule 2 Amendment of other Acts

Schedule 2.1 repeals section 70 of the Land and Environment Court Act 1979.

Schedule 2.2 repeals section 84 of the Supreme Court Act 1970 and makes a consequential amendment to that Act.