

22 November 2010

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The Honourable John Rau MP  
Attorney-General  
DX 336  
ADELAIDE SA

Dear Mr Attorney

***Summary Offences (Prescribed Motor Vehicles) Amendment Bill 2010***

I refer to your letter of 15 September 2010 and thank you for referring the above Bill to the Society for consideration.

The Bill and the Second Reading speech were considered by the Society's Criminal Law Committee. We acknowledge the objects and purposes of the Bill and make the following specific comments in relation to sub-s55(5) and (6) on the basis that:

- a) the vehicle may have value;
- b) the ownership and use of certain vehicles captured by the Bill may be lawful in certain circumstances;

and, consequently, that the vehicle's seizure, retention and forfeiture may be a (significant) trespass of the owner's rights to the vehicle.

***Clause 5: s55(2)***

Sub-section 55(2) extends criminal liability to the owner of a prescribed vehicle which is unlawfully driven or allowed to stand on a road by another person. It places a high onus on the owner. Accepting this, it would be unfair for criminal liability to attach to the owner if he/she does not consent to the use of the vehicle or does not know of its use. As presently framed, the owner would be guilty of an offence against s55(2) even if the vehicle is used without his/her knowledge or consent (particularly where he/she has taken all reasonable precautions to avoid anyone else using the vehicle). We submit that it is patently unfair and improper for criminal liability to attach in those circumstances and, accordingly, we recommend an amendment to the statutory defence provision of s55(4) to correct it.

***Clause 5: s55(4)***

As presently drafted, s55(4) fails to contemplate that the owner of a vehicle may not be responsible for its use by reason of a non-unlawful act of another person. Section 55(4) provides that it is a defence to the offence in s55(2) of being the owner of a vehicle that is driven or standing on a road if the owner

was not in possession or control due to "some unlawful act". There are a myriad of examples where the vehicle might be used without the knowledge or consent of the owner that do not amount to an unlawful act. For example, the child or housemate of the owner might, without the owner's knowledge or consent, innocently (or in circumstances not amounting to an unlawful act) access keys to the vehicle and drive it.

In that instance, the owner might have taken all reasonable precautions to ensure that the vehicle is not on the road or being used by someone yet will be guilty of an offence unless he/she can show that the vehicle was out of his possession/control because of an unlawful act.

We consider the term "some unlawful act" is too narrow to adequately cover scenarios where it would be unfair and improper for criminal liability to attach. This is particularly so with a substantial fine as the maximum penalty. We suggest an amendment that would enable the owner to avoid criminal liability if the vehicle is used (in circumstances that breach s55(2)) without the owner's knowledge or consent.

**Clause 5: s55(5)**

Sub-section 55(5) authorises the seizure and retention of motor vehicles for a finite period. Our principal concern with this provision is that it is draconian. We consider that the power to seize (and consequently retain) should only be exercisable upon the institution of criminal proceedings. We note also that there is no ability to review or challenge a seizure or retention of the vehicle nor does the provision make allowance for the circumstance where proceedings are not instituted.

As presently drafted, a vehicle may be seized (i) prior to a person being reported for an offence; (ii) after a person has been reported but prior to being charged; (iii) "is to be", but is not yet, the subject of action under Part 2 of the *Young Offenders Act*. In each of those cases the vehicle may be seized and retained prior to the commencement of proceedings. Further, in relation to an offence dealt with by way of expiation notice, it seems that seizure (and subsequent forfeiture – sub-s(6)) is quite drastic and disproportional to the offending conduct.

If the power to seize and retain remains prior to charge, then s55(5) requires amendment to reflect the fact that not all people reported, or to be reported etc will be charged, or that an expiation notice may be withdrawn. Presently, s55(5) provides that the seized vehicle may be retained until proceedings are finalised. This phrase is defined in s55(7). The provision does not require or compel the return of the vehicle if proceedings are not instituted. We consider that it should.

We consider that an aggrieved person should have the ability to review or challenge the decision to seize and or retain.



**Clause 5: s55(6)**

We also consider s55(6) to be draconian to the extent that the finding of guilt/admission of an offence automatically leads to forfeiture. We submit that forfeiture should be discretionary. This can easily be achieved by replacing the phrase "is forfeited" with "may be forfeited".

As with s55(5), we consider that an aggrieved person should have the ability to review or challenge the decision to forfeit.

I trust these comments are of assistance. Please do not hesitate to contact me should you wish to discuss any aspect of this submission.

Yours sincerely

  
 Ralph Bönig  
**PRESIDENT**