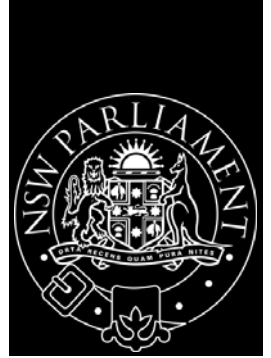


PARLIAMENT OF NEW SOUTH WALES



Legislation Review Committee

LEGISLATION REVIEW DIGEST

No 2 of 2008

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TABLE OF CONTENTS

Membership & Staff.....	ii
Functions of the Legislation Review Committee.....	iii
Guide to the <i>Legislation Review Digest</i>	iv
Summary of Conclusions	vi
Part One – Bills.....	10
SECTION A: Comment on Bills.....	10
1. Crimes Amendment (Drink and Food Spiking) Bill 2008	10
2. Energy Services Corporations Ownership (Parliamentary Powers) Bill 2008*	13
3. Food Amendment (Public Information on Offences) Bill 2008	15
4. Gaming Machines Amendment (Temporary Freeze) Bill 2008	19
5. Local Government Amendment (Election Date) Bill 2008	23
6. Road Transport Legislation Amendment (Car Hoons) Bill 2008	25
7. Totalizator Amendment Bill 2008	31
Appendix 1: Index of Bills Reported on in 2008.....	34
Appendix 2: Index of Ministerial Correspondence on Bills.....	35
Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2008.....	36

* Denotes Private Member's Bill

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FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

The functions of the Legislation Review Committee are set out in the *Legislation Review Act 1987*:

8A Functions with respect to Bills

- (1) The functions of the Committee with respect to Bills are:
 - (a) to consider any Bill introduced into Parliament, and
 - (b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:
 - (i) trespasses unduly on personal rights and liberties, or
 - (ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
 - (iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
 - (iv) inappropriately delegates legislative powers, or
 - (v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny
- (2) A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

9 Functions with respect to Regulations:

- (1) The functions of the Committee with respect to regulations are:
 - (a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,
 - (b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:
 - (i) that the regulation trespasses unduly on personal rights and liberties,
 - (ii) that the regulation may have an adverse impact on the business community,
 - (iii) that the regulation may not have been within the general objects of the legislation under which it was made,
 - (iv) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,
 - (v) that the objective of the regulation could have been achieved by alternative and more effective means,
 - (vi) that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
 - (vii) that the form or intention of the regulation calls for elucidation, or
 - (viii) that any of the requirements of sections 4, 5 and 6 of the Subordinate Legislation Act 1989, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
 - (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.
- (2) Further functions of the Committee are:
 - (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and
 - (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.
- (3) The functions of the Committee do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.

GUIDE TO THE *LEGISLATION REVIEW DIGEST*

Part One – Bills

Section A: Comment on Bills

This section contains the Legislation Review Committee's reports on Bills introduced into Parliament. Following a brief description of the Bill, the Committee considers each Bill against the five criteria for scrutiny set out in s 8A(1)(b) of the *Legislation Review Act 1987* (see page iii).

Section B: Ministerial correspondence – Bills previously considered

This section contains the Committee's reports on correspondence it has received relating to Bills and copies of that correspondence. The Committee may write to the Minister responsible for a Bill, or a Private Member of Parliament in relation to his or her Bill, to seek advice on any matter concerning that Bill that relates to the Committee's scrutiny criteria.

Part Two – Regulations

The Committee considers all regulations made and normally raises any concerns with the Minister in writing. When it has received the Minister's reply, or if no reply is received after 3 months, the Committee publishes this correspondence in the *Digest*. The Committee may also inquire further into a regulation. If it continues to have significant concerns regarding a regulation following its consideration, it may include a report in the *Digest* drawing the regulation to the Parliament's "special attention". The criteria for the Committee's consideration of regulations is set out in s 9 of the *Legislation Review Act 1987* (see page iii).

Regulations for the special attention of Parliament

When required, this section contains any reports on regulations subject to disallowance to which the Committee wishes to draw the special attention of Parliament.

Regulations about which the Committee is seeking further information

This table lists the Regulations about which the Committee is seeking further information from the Minister responsible for the instrument, when that request was made and when any reply was received.

Copies of Correspondence on Regulations

This part of the *Digest* contains copies of the correspondence between the Committee and Ministers on Regulations about which the Committee sought

information. The Committee's letter to the Minister is published together with the Minister's reply.

Appendix 1: Index of Bills Reported on in 2008

This table lists the Bills reported on in the calendar year and the *Digests* in which any reports in relation to the Bill appear.

Appendix 2: Index of Ministerial Correspondence on Bills for 2008

This table lists the recipient and date on which the Committee sent correspondence to a Minister or Private Member of Parliament in relation to Bills reported on in the calendar year. The table also lists the date a reply was received and the *Digests* in which reports on the Bill and correspondence appear.

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2008

This table specifies the action the Committee has taken with respect to Bills that received comment in 2008 against the five scrutiny criteria. When considering a Bill, the Committee may refer an issue that relates to its scrutiny criteria to Parliament, it may write to the Minister or Member of Parliament responsible for the Bill, or note an issue. Bills that did not raise any issues against the scrutiny criteria are not listed in this table.

Appendix 4: Index of correspondence on Regulations reported on in 2008

This table lists the recipient and date on which the Committee sent correspondence to a Minister in relation to Regulations reported on in the calendar year. The table also lists the date a reply was received and the *Digests* in which reports on the Regulation and correspondence appear.

SUMMARY OF CONCLUSIONS

SECTION A: Comment on Bills

1. Crimes Amendment (Drink and Food Spiking) Bill 2008

Issue: Clause 2 - Commencement by proclamation - Provide the executive with unfettered control over the commencement of an Act.

12. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

2. Energy Services Corporations Ownership (Parliamentary Powers) Bill 2008*

11. The Committee has not identified any issues under s 8A(1)(b) of the *Legislation Review Act 1987*.

3. Food Amendment (Public Information on Offences) Bill 2008

Issue: Clause 2 - Commencement by proclamation - Provide the executive with unfettered control over the commencement of an Act.

14. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

4. Gaming Machines Amendment (Temporary Freeze) Bill 2008

Issue - Retrospectivity:

Schedule 1 [9] provides that the proposed provision (Schedule 1 [5]) extends to any social impact assessment provided to the Board (Liquor Administration Board) since 7 December 2007 that would, if approved, result in an increase in the SIA threshold (maximum number of gaming machines) for the venue. If any such social impact assessment has already been approved, the approval has no effect and the SIA threshold is taken not to have been increased.

Schedule 1 [9] also provides that the proposed provision (Schedule 1 [8]) extends to any pending application to keep a multi-terminal gaming machine made since 7 December 2007. If any such application has already been approved, the authorisation has no effect if the application could not have been granted had the proposed provision been in force when the application was granted.

Schedule 1 [9] further provides that the amendments to s 19 of the *Gaming Machines Act 2001*, also extend to pending applications for the Board's approval to transfer hotel poker machine entitlements. If such an application has been approved since 7 December 2007, the transfer has no effect if the approval could not have been given had the amendments to s 19 been in force.

8. The Committee will always be concerned with any retrospective effect of legislation which impacts on personal rights. However, considering the 5 year statutory review of the *Gaming Machines Act 2001* was tabled in Parliament on 7 December 2007, and at the time, the Minister announced a temporary freeze on certain gaming applications, as well as the continuing consultation with the industry on the reform changes to be finalised in the new *Gaming Machines Act*, along with considerations for strengthening the legislation's harm minimisation measures to assist problem gamblers, the retrospective effect may not trespass unduly on personal rights.
9. Although the provisions have retrospective application, the Committee considers that they may cause hardship to problem gamblers if they were not to apply. Therefore, the Committee considers the retrospective effect may not trespass unduly on personal rights.
10. The Committee is of the view that the right to seek damages or compensation is an important personal right and that these rights should not be removed or restricted by legislation unless there is a compelling public interest in doing so. However, the Committee notes that the 5 year statutory review of the *Gaming Machines Act 2001* was tabled in Parliament on 7 December 2007, and at the time, the Minister announced a temporary freeze on certain gaming applications, and further, considers that individual rights may give way in some circumstances, such as public interests of harm minimisation measures to assist problem gamblers.

5. Local Government Amendment (Election Date) Bill 2008

4. The Committee has not identified any issues under s 8A(1)(b) of the Legislation Review Act 1987.

6. Road Transport Legislation Amendment (Car Hoons) Bill 2008

23. The Committee considers that, except in extraordinary circumstances, it is inappropriate for an absolute liability offence, particularly one that does not allow for a defence or reasonable excuse and where there is no provision for review rights. The Committee, therefore, considers the proposed s 219B and 219A (8) to be inserted into the 2005 Act, as absolute liability offences, with the absence of any defence of reasonable excuse, may amount to an undue trespass on individual rights, and refers this to Parliament.

Issue: Excessive Punishment

Schedule 2 [4] amends s 41 of the 1999 Act to provide penalty increases. Schedule 2 [5]: increases the maximum penalty for the aggravated (burnout) offence from 7 penalty units to a maximum of 30 penalty units (in the case of a first offence) or 30 penalty units or imprisonment for 9 months or both (in the case of a second or subsequent offence).

26. However, the Committee takes into consideration by comparison of the above serious offences of mid-range drink driving and the use or attempted use of a vehicle under the influence of alcohol or drugs as carrying a similar penalty range to the proposed maximum penalty range for burnout offences under the proposed Bill, and contrasts the maximum penalty under the ACT legislation for similar burnout offences. Accordingly, the Committee considers that the increased penalties could be regarded as too severe, noting that the huge rise from a maximum penalty of 7 penalty units to a maximum of 30 penalty units for a first offence (or 30 penalty units or imprisonment for 9 months or both for a second or subsequent offence), may be an undue trespass on personal rights and liberties, and refers this to Parliament.

Schedule 2 [5] –

- for proposed s 41 (2) (f): **organise, promote or urge any person to participate in, or view, any group activity involving the operation of one or more vehicles for road and drag racing and other activities;**
- for proposed s 41 (2) (g): **photograph or film a motor vehicle being operated for road and drag racing and other activities for the purpose of organising or promoting the participation of persons in any such group activity ;**
- **the penalty is the same as for the driver offender of the aggravated offence (liable to a maximum of 30 penalty units in the case of a first offence), or 30 penalty units or imprisonment for 9 months or both (in the case of a second or subsequent offence).**

27. The Committee considers that the same liability and maximum penalty imposed on the offender drivers of the vehicles in drag racing or burnouts (30 penalty units in the case of a first offence or 30 penalty units or imprisonment for 9 months or both in the case of a second or subsequent offence) as proposed for groups of people or associates that gather to watch, urge others on or who take photographs or films of burnouts and drag racing, but who were not the drivers, could be regarded as so severe as to trespass unduly on personal rights and liberties; and refers this to Parliament.

7. Totalizator Amendment Bill 2008

5. The Committee has not identified any issues under s 8A(1)(b) of the *Legislation Review Act 1987*.

Part One – Bills

SECTION A: COMMENT ON BILLS

1. CRIMES AMENDMENT (DRINK AND FOOD SPIKING) BILL 2008

Date Introduced:	28 February 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Barry Collier MP
Portfolio:	Parliamentary Secretary

Purpose and Description

1. The object of this Bill is to amend the *Crimes Act 1900* so as:

- (a) to create a new summary offence of spiking a person's drink or food with an intoxicating substance with intent to harm the person (maximum penalty 2 years imprisonment or \$11,000 fine, or both), and
- (b) to ensure that other more serious related offences apply to the use of intoxicating substances (namely, using intoxicating substances to commit indictable offences, to endanger life, to inflict grievous bodily harm or to injure or cause distress or pain).

Background

2. According to the Agreement in Principle speech:

This Bill marks the New South Wales Government's response to growing community concerns about the practice of drink spiking by introducing a new two-year summary offence for drink and food spiking, and modernising existing offences relevant to drink spiking to ensure that they apply to the use of alcohol. Drink spiking is an insidious practice. It was identified as a significant problem throughout Australia in an Australian Institute of Criminology report. The institute estimated that up to 4,000 cases of drink spiking occur across Australia each year, that the spiking agent most commonly used was alcohol, that one-third of drink spikings involve sexual assault, that four out of five victims were young women and that only one in six cases of drink spiking were reported to police.

Drink spiking is not harmless or simply a funny prank; it has a variety of negative physical and emotional effects on the victim. In the majority of incidents, the physical effects include memory loss and nausea. Also common are intoxication, vomiting, unconsciousness and even paralysis. Those effects are, of course, compounded if there is additional associated criminal behaviour. Following the Australian Institute of Criminology report, the Standing Committee of Attorneys General commissioned the Model Criminal Law Officers Committee to examine the issue. The committee, which finalised its report in July 2007, found that there were already a number of State and Territory criminal laws of general application covering the most serious cases of drink spiking and its consequences. Despite the existence of these laws, the committee identified a gap in the law when it came to addressing the act of drink spiking itself. As a result, the committee devised a model food and drink spiking offence. To

date, Western Australia, Queensland and South Australia have also introduced offences similar to the model food and drink spiking offence.¹

The Bill

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

4. Schedule 1 [1] inserts a definition of *intoxicating substance* into the Principal Act. The expression is defined to include alcohol or a narcotic drug or any other substance that affects a person's senses or understanding.

5. The amendments made by Schedule 1 [2] ensure that a reference in the Principal Act to causing an intoxicating substance to be administered to or taken by a person includes a reference to causing a person to inhale, take or be exposed to the intoxicating substance in the person's environment.

6. The Bill inserts proposed s 38A into the Principal Act to create the summary offence of spiking drink or food. The new offence carries a maximum penalty of two years imprisonment, or a fine of 100 penalty units (\$11,000) or both.

The Agreement in Principle speech states this penalty is appropriate, considering that the offence is at the lower end of the drink spiking continuum, and fits within the tiered penalty structure currently applying to the more serious drink spiking offences in the *Crimes Act*.

7. The offence is committed if the offender causes another person to be given or to consume drink or food containing an intoxicating substance (or more of any such substance than the other person would expect it to contain) in circumstances where:

(a) the other person is not aware the drink or food contains the substance (or that quantity of the substance), and

(b) the accused intends the other person to be harmed by the consumption of the drink or food (including any impairment of the senses or understanding that the other person might reasonably be expected to object to in the circumstances).

8. The Bill provides two defences to any proceedings under the new s 38A.

Firstly, it will be a defence where the person had reasonable cause to believe that each person who was likely to consume the drink or food would not have objected to consuming the drink or food if the person was aware of the presence and quantity of the intoxicating substance in the drink or food. Secondly, there is a defence when a person uses an intoxicating substance in the course of a medical, dental or other health professional practice.

9. The Agreement in Principle speech indicates these defences are intended to clarify the extent of the application of the offence and ensure that prosecutions and convictions are targeted towards appropriate levels and categories of criminality.

10. Under substituted s 38 of the Bill, the act of spiking a drink will incur a separate penalty of up to 25 years jail when done in combination with serious offences such as sexual assault and robbery.

¹ Barry Collier MP, Legislative Assembly Hansard, 28 February 2008

Issues Considered by the Committee

Delegation of legislative powers [s 8A(1)(b)(iv) LRA]

Issue: Clause 2 - Commencement by proclamation - Provide the executive with unfettered control over the commencement of an Act.

11. The Committee notes that the proposed Act is to commence on a day to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

12. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

2. ENERGY SERVICES CORPORATIONS OWNERSHIP (PARLIAMENTARY POWERS) BILL 2008*

Date Introduced:	27 February 2008
House Introduced:	Legislative Council
Minister Responsible:	Dr John Kaye, MLC
Portfolio:	Non Government – The Greens

Purpose and Description

1. This Bill prevents the sale, lease or disposal of the main undertakings of an energy services corporation, or of its subsidiaries, without a mandate from the people's elected representatives in Parliament.

Background

2. This Bill ensures that the sell-off of retailers, the leasing of generators or the sell-off, lease or disposal of any other of the main undertakings of an energy services corporation will not proceed without a relevant motion passing through both Houses of Parliament. Section 11 of the *Energy Services Corporations Act 1995* is titled, 'Prohibition on privatisation of energy services corporation', where it is debated that it is unlawful to sell an energy services corporation except to an eligible Minister.
3. According to the Agreement in Principle speech, the Bill does not prohibit privatisation of an energy services corporation or its main undertakings.
4. The Government is proposing to lease the generators for long term, possibly 50 or 100 years depending on the leasing arrangement. The retailers are not separate energy services corporations as they are owned within distribution energy services corporations. The debate is that as the energy services corporation itself is not being sold, just the business of an energy services corporation is to be sold, therefore, it is argued that this is not privatisation.
5. There has also been extensive debate in the media. The opinion polls (the Infrastructure Partnerships Australia poll, the Unions NSW poll, the Herald-Nielsen poll) indicate concerns about privatisation. The Bill looks at energy and electricity as essential services, and in the Agreement in Principle speech: "it is a matter of democratic principle that the issue be debated by Parliament and be approved or rejected according to the will of the people"².
6. The *Energy Services Corporation Act 1995* sets out 7 energy service corporations in NSW: 3 generation corporations (Eraring, Macquarie and Delta); 3 distribution energy

² Dr John Kaye MLC, Legislative Council Hansard, 27 February 2008

service corporations (Country Energy, EnergyAustralia and Integral Energy); 1 transmission energy services corporation (Transgrid). This Bill covers the sale, lease or disposal of any assets of these 7 corporations.

7. The Bill will allow transfers between subsidiaries of energy service corporations of any of the main undertakings (such as businesses of an energy service corporation including the retailer, the generators of a generation energy service corporation or the distribution network or transmission network of a distribution or transmission energy services corporation).
8. Parliamentary Counsel has designed this Bill so as not to prohibit the sale of minor items and excess items.

The Bill

9. The object of this Bill is to prevent the sale, lease or other disposal of the main undertakings of an energy services corporation, or of its subsidiaries, without a mandate from the people's elected representatives in Parliament.

10. Outline of provisions

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 the date of assent to the proposed Act.

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

Clause 4 provides that the approval of both Houses of Parliament is required before the main undertakings of an energy services corporation may be sold, leased or otherwise disposed of.

Issues Considered by the Committee

- | |
|--|
| <ol style="list-style-type: none">11. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>. |
|--|

The Committee makes no further comment on this Bill.

3. FOOD AMENDMENT (PUBLIC INFORMATION ON OFFENCES) BILL 2008

Date Introduced:	28 February 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Nathan Rees
Portfolio:	Minister for Emergency Services, and Minister for Water

Purpose and Description

1. The object of this Bill is to amend the *Food Act 2003* (***the Principal Act***), as follows:
 - (a) to extend the powers of the Food Authority to publish information about offences under the Principal Act relating to the handling and sale of food, including by:
 - (i) permitting the Food Authority to keep a public register of offences committed under the Principal Act relating to the handling and sale of food, and
 - (ii) permitting the Food Authority to name in that register any person found guilty by a court of such an offence or whose employee or agent is found guilty of such an offence (whether or not a conviction is entered following the guilty finding),
 - (b) to give the Food Authority power to publish information about penalty notices issued for alleged offences under the Principal Act relating to the handling and sale of food, including by:
 - (i) permitting the Food Authority to keep a public register of penalty notices served for such offences, and
 - (ii) permitting the Food Authority, subject to certain limitations, to name in that register persons served with such penalty notices,
 - (c) to permit the disclosure of personal information by various public sector agencies for the purpose of enabling the Food Authority to exercise its new functions,
 - (d) to confer protection from liability, including liability in defamation, in respect of the disclosure of such information,**
 - (e) to provide for the payment of fines and penalties recovered by the Food Authority into the Food Authority Fund.
2. The Bill also makes other minor and consequential amendments, including to another Act.

Background

3. According to the Agreement in Principle speech:

This Bill will allow details of food safety breaches to be made public. As a result, consumers in New South Wales will be able to make more informed choices when it comes to food safety. In addition to people being better informed about food safety, another feature of this bill is the incentive it provides to the food industry to boost its performance.

In response to public debate, the Food Authority commenced publishing Food Act convictions on its website in July 2007. The Government recognised that publication of successful convictions would provide additional deterrents for non-compliance by food businesses. In addition it also undertook a review to identify options for the publication of similar details of food businesses that are issued with a penalty notice for food safety breaches. In doing so the New South Wales Government's objective were clear—to push the boundaries in enhancing the public's knowledge about food safety breaches without unfair impacts on the integrity and reputation of food businesses, and to deliver the net effect of improving consumer information and industry standards.

To facilitate this review, the Food Authority convened a stakeholder forum on 15 August 2007. The forum was co-hosted with the Local Government and Shires Associations of New South Wales and was well attended by a broad cross-section of stakeholders, including those from the food industry, local government and consumer advocacy groups. The forum was critically important as the feedback was used to refine proposals and is properly reflected in the legislation.

The Food Amendment (Public Information on Offences) Bill 2008 amends the Food Act 2003 to achieve three key objectives. Firstly, it finetunes the current power of the Food Authority to publish information about convictions. The Bill will permit the publication of such information directly on its website without first having to publish the information in a newspaper or the *Government Gazette*, as is currently the case. This amendment ensures that information is made available as quickly as possible and in a more accessible way.

It also facilitates the publication of convictions that have been secured by other enforcement agencies under the Food Act. The public has the right to know details of all Food Act convictions, regardless of which level of government takes action.

Secondly, the Bill expands the publication requirements of names and offenders under the Act. It will give the Food Authority power to publish information about penalty notices relating to the sale and handling of food issued under the Act.

Thirdly, a limitation of liability in respect of the disclosure and publication of such information will be provided. This protection ensures that not only can the Food Authority legally publish the relevant breach information but also that fair dealing and reporting of those matters will be protected. This is important as it will protect all proper forms of information dissemination that promotes both public interest and awareness in food safety matters. The key policy justification underpinning the proposed amendments in the bill is clear: that the public has a right to information on food law breaches by retail and food service businesses.³

³ Nathan Rees MP, Legislative Assembly, Hansard 28 February 2008.

The Bill

4. The Bill proposes to amend the *Food Act 2003* by inserting a proposed Part 10A into the *Food Act 2003* to extend the powers of the Food Authority to publish information about offences relating to the handling and sale of food. This is done by permitting the Food Authority to keep a public register of offences committed and to name in that register any person found guilty by a court of such an offence or whose employee or agent is found guilty of the offence.
5. Proposed s 133A enables the Food Authority to publish information about penalty notices issued for alleged offences by keeping a public register of penalty notices served, and permitting the Food Authority (subject to certain limitations) to name in that register persons served with penalty notices.
6. Information must not be published on the register of penalty notices unless:
 - a. The amount payable under the penalty notice has been fully or partly paid, or
 - b. A penalty notice enforcement order has been issued in respect of the penalty notice, or
 - c. At least 70 days has elapsed since the penalty notice was served and the penalty notice is unresolved (including where a person elects to contest the notice in court).
7. Proposed s 133B provides that the registers are made available for public inspection on the internet website of the Food Authority.
8. The Food Authority reserves the right to correct or remove information on the register or interested persons may apply to have it corrected or removed.
9. Public sector agencies will also be able to disclose personal information to the Food Authority to enable it to exercise these functions under these provisions.
10. The Bill also exempts the Food Authority from liability in defamation if it discloses this information.
11. Provision is also made for the payment of fines and penalties to be conferred into the Food Authority fund.

Issues Considered by the Committee

Issue: Trespasses on personal rights and liberties [s 8A(1)(b)(i) LRA]

12. The provisions of the Bill seek to achieve a balance between the right of the public to information on compliance with food standards and fairness to businesses having regard to the commercial impact of the published information. The Committee is always concerned about protection of privacy. However, the Committee believes that

on balance the public interest is strong enough to justify the provisions of this Bill. The Committee notes that appeal provisions remain available and that appropriate provisions exist for changes and corrections to information on the registers.

Delegation of legislative powers [s 8A(1)(b)(iv) LRA]

Issue: Clause 2 - Commencement by proclamation - Provide the executive with unfettered control over the commencement of an Act.

13. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

14. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

4. GAMING MACHINES AMENDMENT (TEMPORARY FREEZE) BILL 2008

Date Introduced:	28 February 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Graham West MP
Portfolio:	Gaming and Racing; Sport and Recreation

Purpose and Description

1. This Bill amends the *Gaming Machines Act 2001* to impose a temporary freeze on the maximum number of gaming machines that may be kept in a hotel or club and to make further provision in relation to the transfer of hotel poker machine entitlements; and for related purposes.
2. The first change is to impose a freeze on the approval of new social impact assessment applications by hotels and clubs to increase their gaming machine thresholds or the maximum number of gaming machines that may be authorised to be kept in their venues (referred to as the venue's SIA threshold). This freeze will remain until the commencement of the new Gaming Machines Act.
3. The second change relates to the Gaming Machines Act review recommendation to impose a 15% cap on the number of multi-terminal gaming machines that a club may operate on its premises. This Bill will impose a temporary freeze on new applications for additional multi-terminal gaming machines by clubs already operating above the proposed 15% cap. It will also impose a temporary freeze on new applications by clubs that would potentially breach the proposed multi-terminal gaming machine cap. The policy determination on the proposed cap is still subject to further consultation. The freeze will remain until the finalisation of the new Gaming Machines Act.
4. The last change will clarify who is required to consent to the transfer of poker machine entitlements from a leased hotel. Under the current legislation, the Liquor Administration Board (the Board) must take into consideration when making a decision on an application to transfer poker machine entitlements any submissions which assert to a person's relevant financial interest in the hotelier's licence. The relevant financial interest excludes persons who are the owner of a hotel. Within the review's report, the Minister proposed to amend the legislation to ensure that the owner of a hotel who has a beneficial interest in the licence will be able to object to the transfer of entitlements from a leased hotel. This aims to prevent new applications for the sale of poker machine entitlements by lessees where consent has not been given by the lessor and others with a financial interest in the licence or business. The amendments will apply to applications lodged since 7 December 2007 but do not apply to applications lodged before the Minister's announcement.

Background

5. The 5-year statutory review of the *Gaming Machines Act 2001* was tabled in Parliament on 7 December 2007. The proposed package consists of 42 legislative and non-legislative reforms. The intent is to further encourage a reduction in gaming machine numbers through the removal of unnecessary red tape and the enhancement of the legislation's existing harm minimisation measures to assist problem gamblers. At the time, the Minister announced a temporary freeze on certain gaming applications. Due to the time gap between announcement of the reforms in December 2007 and developing a package of reforms, this Bill introduces changes to prevent operators rushing through new gaming machine applications in the meantime.
6. Consultation is continuing with the industry on the reform changes to be finalised in the new Gaming Machines Act.

The Bill

The object of this Bill is to amend the *Gaming Machines Act 2001* as follows:

- (a) to impose a temporary freeze on the maximum number of gaming machines that may be kept in a hotel or on the premises of a registered club by preventing the approval of social impact assessments that would result in an increase in the SIA threshold for the hotel or club premises,
- (b) to impose a temporary freeze in relation to the keeping of multi-terminal gaming machines on club premises by preventing the granting of applications to keep additional multi-terminal gaming machines in certain circumstances,
- (c) to provide that, in the case of a hotel that is subject to lease, the Liquor Administration Board may approve the transfer of a poker machine entitlement allocated in respect of the hotel licence only if it is satisfied that the transfer of the entitlement is, unless it was purchased by a person other than the lessor, supported by the lessor who has a beneficial interest in the business of the hotel.

7. Outline of Provisions

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 the date of assent to the proposed Act.

Clause 3 is a formal provision that gives effect to the amendments to the *Gaming Machines Act 2001* set out in Schedule 1.

Clause 4 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and s 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendments

Temporary freeze on maximum number of gaming machines

Under Division 1 of Part 4 of the *Gaming Machines Act 2001*, a social impact assessment is required to be provided to the Board if a hotel or registered club is seeking to increase the maximum number of gaming machines that may be authorised to be kept in the hotel or on the club's premises (this number is referred to as the venue's **SIA threshold**). The Board's approval of the social impact assessment is required before the SIA threshold is increased.

Schedule 1 [5] provides that the Board cannot, during the period starting on the commencement of the proposed Act and ending on a date appointed by proclamation (*the period of the freeze*), approve a social impact assessment if it would result in an increase in the SIA threshold for the venue concerned.

Temporary freeze in relation to multi-terminal gaming machines

At present the Board may authorise registered clubs to keep multi-terminal gaming machines (which is a machine designed to be played by more than one player at the same time and is equipped with more than one player terminal). **Schedule 1 [8]** provides that the Board cannot, during the period of the freeze, approve an application for an additional multi-terminal gaming machine if more than 15% of the gaming machines authorised to be kept on the club's premises are terminals forming part of multi-terminal gaming machines (or if granting the application would result in such terminals comprising more than 15% of the gaming machines authorised to be kept on the premises).

Transfer of hotel poker machine entitlements

Section 19 of the *Gaming Machines Act 2001* provides for the transfer of hotel and club poker machines entitlements. Such a transfer has effect only if it is approved by the Board. In the case of a hotel, an application for the Board's approval to transfer a poker machine entitlement must demonstrate that the proposed transfer is supported by each person who, in the opinion of the Board, has a financial interest in the hotel licence. Section 19 currently provides that a person is taken to have a financial interest if the person is entitled to receive any income derived from the business carried on under the authority of the licence or any other financial benefit or financial advantage from the carrying on of the business.

Schedule 1 [1] provides that a person is also taken to have a financial interest in the hotel licence if, in the case where the hotel is subject to a lease, the person is the lessor and has a beneficial interest in the business of the hotel (including the goodwill of the business at the end of the lease). However, **Schedule 1 [4]** provides that the support of such a lessor is not required in relation to the transfer of a poker machine entitlement that was purchased by a person other than the lessor.

Section 19 (6) of the Act also currently provides that a person is not to be considered as having a financial interest in a hotel licence by reason only of the person being the owner of the hotel. **Schedule 1 [3]** makes it clear that the owner of the hotel in this context refers to the owner of the building comprising the hotel (rather than the owner of the hotel business). **Schedule 1 [2]** is consequential on the amendment made by Schedule 1 [1].

Issues Considered by the Committee

Trespasses on personal rights and liberties [s 8A(1)(b)(i) LRA]

Issue - Retrospectivity:

Schedule 1 [9] provides that the proposed provision (**Schedule 1 [5]**) extends to any social impact assessment provided to the Board (Liquor Administration Board) since 7 December 2007 that would, if approved, result in an increase in the SIA threshold (maximum number of gaming machines) for the venue. If any such social impact assessment has already been approved, the approval has no effect and the SIA threshold is taken not to have been increased.

Schedule 1 [9] also provides that the proposed provision (**Schedule 1 [8]**) extends to any pending application to keep a multi-terminal gaming machine made since 7

December 2007. If any such application has already been approved, the authorisation has no effect if the application could not have been granted had the proposed provision been in force when the application was granted.

Schedule 1 [9] further provides that the amendments to s 19 of the *Gaming Machines Act 2001*, also extend to pending applications for the Board's approval to transfer hotel poker machine entitlements. If such an application has been approved since 7 December 2007, the transfer has no effect if the approval could not have been given had the amendments to s 19 been in force.

8. The Committee will always be concerned with any retrospective effect of legislation which impacts on personal rights. However, considering the 5 year statutory review of the *Gaming Machines Act 2001* was tabled in Parliament on 7 December 2007, and at the time, the Minister announced a temporary freeze on certain gaming applications, as well as the continuing consultation with the industry on the reform changes to be finalised in the new Gaming Machines Act, along with considerations for strengthening the legislation's harm minimisation measures to assist problem gamblers, the retrospective effect may not trespass unduly on personal rights.
9. Although the provisions have retrospective application, the Committee considers that they may cause hardship to problem gamblers if they were not to apply. Therefore, the Committee considers the retrospective effect may not trespass unduly on personal rights.

Issue – Denial of Compensation:

Schedule 1 [9]: proposed s 42 - Crown not liable for any compensation – because of the enactment of the amending Act or the operation of the amendments made by the amending Act or for the consequences of that enactment or operation.

10. The Committee is of the view that the right to seek damages or compensation is an important personal right and that these rights should not be removed or restricted by legislation unless there is a compelling public interest in doing so. However, the Committee notes that the 5 year statutory review of the *Gaming Machines Act 2001* was tabled in Parliament on 7 December 2007, and at the time, the Minister announced a temporary freeze on certain gaming applications, and further, considers that individual rights may give way in some circumstances, such as public interests of harm minimisation measures to assist problem gamblers.

The Committee makes no further comment on this Bill.

5. LOCAL GOVERNMENT AMENDMENT (ELECTION DATE) BILL 2008

Date Introduced:	27 February 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Paul Lynch MP
Portfolio:	foreign
ordinary	Minister for Local Government, Minister for Aboriginal Affairs, and Minister Assisting the Minister for Health

Purpose and Description

1. The object of this Bill is to amend the *Local Government Act 1993* to change the date of ordinary elections of councillors from the fourth to the second Saturday in September every four years, starting in 2008, and to make associated amendments.

Background

2. According to the Agreement in Principle speech:

The Bill reflects an ongoing commitment to providing an effective system of electoral administration for New South Wales local councils. The purpose of the Bill is to return the day for the holding of the ordinary local government elections to the second Saturday in September every four years. This will mean that the council election date for this year will be brought forward by two weeks from 27 September to 13 September. In doing so, the bill acknowledges concerns raised by the local government sector and the Executive of the Local Government and Shires Association of New South Wales that holding the elections on the fourth Saturday of September would clash with the start of the New South Wales public schools holidays.

A clash is avoidable. This Bill will ensure that voters will not be inconvenienced and that candidates will not be disadvantaged. The bill will also bring the Local Government Act 1993 back into line with previous elections practice. By returning the election date to the second Saturday in September it will correct an anomaly caused by amendments made in the Upper House to legislation passed in 2003.⁴

The Bill

3. Outline of provisions

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 the date of assent to the proposed Act.

⁴ Paul Lynch MP, Legislative Assembly Hansard, 27February 2008

Clause 3 is a formal provision that gives effect to the amendments to the *Local Government Act 1993* set out in Schedule 1.

Clause 4 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and s 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 [1] amends s 287 to make the change referred to in the Agreement in Principle speech.

Schedule 1 [2] amends Schedule 8 to enable regulations to be made of a savings, transitional or other nature consequent on the enactment of the proposed Act.

Schedule 1 [3] inserts a new Part (containing clause 91) into Schedule 8 to provide that s 66FA of the *Parliamentary Electorates and Elections Act 1912* (which applies to parties registered under that Act and is applied, with modifications, to parties registered under the *Local Government Act 1993*) will not apply to a political party registered on or before 27 August 2007. Section 66FA, as it applies in relation to local government elections, provides that the registration of a party does not become effective until the first anniversary of its registration for the following purposes:

- (a) party endorsement on ballot-papers,
- (b) nomination of candidates by a party,
- (c) registration of electoral material by a party.

The new clause ensures that a party registered on or before 27 August 2007 will not be affected by the change to the earlier date for the September 2008 elections.

Issues Considered by the Committee

<p>4. The Committee has not identified any issues under s 8A(1)(b) of the Legislation Review Act 1987.</p>

The Committee makes no further comment on this Bill.

6. ROAD TRANSPORT LEGISLATION AMENDMENT (CAR HOONS) BILL 2008

Date Introduced:	27 February 2007
House Introduced:	Legislative Assembly
Minister Responsible:	Hon David Campbell MP
Portfolio:	Police

Purpose and Description

1. This Bill amends the *Road Transport (General) Act 2005*, the *Road Transport (Safety and Traffic Management) Act 1999* and certain other road transport legislation to make further provision with respect to certain speeding and other dangerous driving offences; and for other purposes.

Background

2. The Bill introduces new penalties against drivers convicted of street racing or aggravated burnout offences. It will increase the maximum penalty for street racing from 20 penalty units (\$2,200) to 30 penalty units (\$3,300) for a first offence or to \$3,300 or 9 months imprisonment, or both, for a second or subsequent street racing offence. A second offence can attract a potential term of imprisonment.
3. The criteria of burnouts are expanded to aggravated burnouts, and the penalties for such offences are increased. According to the Agreement in Principle speech:

The bill provides that "aggravated burnouts" will now include behaviour such as repeated burnouts, long and loud burnouts that disturb community amenity, burnouts that endanger public safety and burnouts that are committed as part of a group activity. All these factors contribute to the severity of the burnout. As such, they should also contribute to the severity of the penalty. The bill increases the penalty for aggravated burnouts to \$3,300 for a first offence and \$3,300 and up to nine months imprisonment, or both, for a second or subsequent offence.

The bill also introduces tough new penalties for the mates of hoon drivers. Not only will hoon drivers be charged for their reckless behaviour, but also the groups of friends and associates that may gather to watch, or urge others on, or who take photographs or film to glamorise the activity. The bill introduces offences for willingly participating in a group activity involving burnouts; viewing, organising, promoting, or urging any person to participate in any group activity involving burnouts; and photographing or filming a motor vehicle doing burnouts for the purpose of using the photographs or film to promote or organise group activity involving burnouts. The penalties are the same for these people: \$3,300 for a first offence and \$3,300 or nine months imprisonment, or both, for a second or subsequent offence. This will ensure that all participants in aggravated burnout activities will be charged, not just those driving the vehicle at the time the offence is detected.⁵

⁵ David Campbell MP, Legislative Assembly Hansard, 28 February 2008

4. Currently, s 40 of the *Road Transport (Safety and Traffic Management) Act 1999* makes it an offence to organise, promote or take part in certain races, speed record attempts, speed trials or competitive trials of motor vehicles on roads or road related areas without the written approval of the Commissioner of Police (the *street racing offence*).
5. This Bill also proposes amendments to s 41 (1) of that Act, which currently contains an offence of operating a motor vehicle in a manner that causes it to undergo sustained loss of traction against the road surface (the *burnout offence*) and s 41 (2) contains an offence of so operating a motor vehicle knowing that any petrol, oil, diesel fuel or other inflammable liquid has been placed on the surface of the road (the *aggravated burnout offence*).
6. Amendments are proposed for Division 2 of Part 5.5 (s 217–228) of the *Road Transport (General) Act 2005* which contains certain sanctions relating to the detention, impounding and forfeiture of motor vehicles used in connection with these street racing and burnout offences.
7. The Agreement in Principle speech stated that the Government will trial the wheel-clamping provisions for a 12 month period in one metropolitan location and one regional location. The Bill proposes that the RTA can use vehicles driven and owned by people convicted of street racing or aggravated burnout offences for crash testing.

The Bill

8. The object of this Bill is to amend the *Road Transport (Safety and Traffic Management) Act 1999* (the **1999 Act**) and the *Road Transport (General) Act 2005* (the **2005 Act**) as follows:
 - (a) to increase the penalty for a street racing offence from a maximum of 20 penalty units to a maximum of 30 penalty units (in the case of a first offence) or 30 penalty units or imprisonment for 9 months or both (in the case of a second or subsequent offence),
 - (b) to expand the ambit of the aggravated burnout offence and increase the maximum penalty for that expanded offence from a maximum of 7 penalty units to a maximum of 30 penalty units (in the case of a first offence) or 30 penalty units or imprisonment for 9 months or both (in the case of a second or subsequent offence),
 - (c) to provide for an automatic licence disqualification period of 12 months for a person convicted of the expanded aggravated burnout offence,
 - (d) to increase the maximum penalty for the burnout offence from a maximum of 5 penalty units to a maximum of 10 penalty units,
 - (e) to enhance the operation of Division 2 of Part 5.5 of the 2005 Act and to provide additional and more effective sanctions (such as wheel clamping and crash testing) in respect of the street racing offence and expanded aggravated burnout offence,
 - (f) to provide for the immediate suspension under s 205 or 206 of the 2005 Act of the driver licences and visitor driver privileges, respectively, of persons charged with the street racing offence or expanded aggravated burnout offence.

The Bill also contains amendments of a related, consequential or savings and transitional nature to the 1999 Act, the 2005 Act and other related legislation (set out in Schedule 3 to the Bill).

9. Outline of provisions

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 or days to be appointed by proclamation.

Clause 3 is a formal provision that gives effect to the amendments to the *Road Transport (General) Act 2005* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to the *Road Transport (Safety and Traffic Management) Act 1999* set out in Schedule 2.

Clause 5 is a formal provision that gives effect to the amendments to the Act and regulations set out in Schedule 3.

Clause 6 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and s 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Some of the proposed amendments to the *Road Transport (Safety and Traffic Management) Act 1999* (the 1999 Act):

10. Section 41 (2) provides for the aggravated offence of operating a vehicle to cause it to lose traction knowing that any petrol, oil, diesel fuel or other inflammable liquid has been placed on the surface of the road or one or more tyres of the vehicle. **Proposed amendment will expand s 41 (2)** to include doing things that prolong, sustain, intensify or increase the loss of traction, operating a vehicle in that way in a place knowing that there is an appreciable risk that it would interfere with the amenity of the locality or make it unsafe for any person and participating, urging others to participate, in group activities involving the operation of a vehicle in this way.
11. The maximum penalty for the aggravated offence is increased from a maximum of 7 penalty units to a maximum of 30 penalty units for the first offence or 30 penalty units or imprisonment for 9 months or both for a second or subsequent offence.
12. **Proposed s 41 (7)** will automatically disqualify the person from a driver licence for a period of 12 months if the person is convicted of the expanded aggravated offence under s 41 (2) (a), (b), (c) or (d).
13. **Section 40** on street racing will be amended to increase the maximum penalty from 20 penalty units to 30 penalty units for a first offence or 30 penalty units or imprisonment for 9 months or both for a second or subsequent offence.

Some of the proposed amendments to the *Road Transport (General) Act 2005* (the 2005 Act):

14. The Bill distinguishes between drivers who use their own vehicle to commit such offences and drivers who use another person's vehicle. In cases where a driver is found guilty of street racing or aggravated burnout offence committed in another person's vehicle, the Bill provides for sanctions against the registered operator of that vehicle. The Roads and Traffic Authority (RTA) will issue the registered operator with a suspension warning notice (**proposed s 219B**). The warning notice gives the

registered operator notice that additional sanctions will apply if any vehicle owned by them is used in further street racing or aggravated burnout offence within 5 years. If the vehicle owned by them is used in a second street racing or aggravated burnout offence within 5 years of the suspension warning notice, the RTA may suspend the vehicle's registration for up to 3 months. If a vehicle belonging to that registered owner is used in a third offence within 5 years from the date of the suspension warning notice, the vehicle may be forfeited to the Crown.

15. In cases where a driver is found guilty of a street racing or aggravated burnout offence in their own vehicle, the vehicle can be impounded or clamped for 3 months for a first offence, and forfeited to the Crown for a second or subsequent offence (**proposed s 219**). A vehicle that is forfeited may then be sold or provided to the Roads and Traffic Authority (RTA) to be used for crash testing and educational program: **proposed s 227 (5) and (6)**.
16. Currently, vehicles used in connection with a street racing or burnout offence can already be impounded for a first offence and forfeited for a second or subsequent offence. The proposed changes are to include that vehicles can be clamped and be used for crash testing. This Bill provides police with new powers to wheel-clamp vehicles. Wheel clamping will be an alternative sanction to impounding (**proposed s 219 or 219A**). It allows the NSW Police Force to appoint a clamping agent (**proposed s 219C**). Vehicles will be able to be clamped at the registered operator's expense (**proposed s 219F**) for 3 months. A penalty of \$2,200 for those who tamper with, damage or remove wheel clamps from a clamped vehicle (**proposed s 219G**). Clamping agents need to carry identification.
17. Another proposed change is to restrict the court's discretion to reduce, commute or dispense with a period of confiscation or forfeiture or removal of clamping or impounding, to cases of extreme hardship. Penalties will not be reduced because of inconvenience such as difficulty in carrying out employment, in travelling to or from a place of employment, business or education: **proposed s 219 (5) and (6)**.
18. It will allow the Roads and Traffic Authority (RTA) to use the vehicles for crash testing and educational programs: **proposed s 227 (5) and (6)**.
19. The Bill also makes amendments to the current confiscation provisions for police. Currently, police can seize a vehicle only if they can find and have access to the vehicle. The Bill will provide the police with a power to demand from either a driver or the registered operator, that a vehicle be produced for confiscation. Non-compliance with the production notice without a reasonable excuse will be an offence with a maximum penalty of \$2,200: **proposed s 218 (7) – (11)**. The RTA will be able to suspend the registration of that vehicle for up to 3 months so the penalty includes a fine for not complying with a police direction and a vehicle sanction for not producing the vehicle for confiscation: **proposed s 218 (8)**.

Issues Considered by the Committee

Trespasses on personal rights and liberties [s 8A(1)(b)(i) LRA]

Issue: Absolute Liability - Proposed s 219B to be inserted into the 2005 Act - suspension warning notices to the registered operator of a vehicle used in connection with an offence for which an offending driver is found guilty under the

proposed s 40 or the proposed s 41 (2) of the 1999 Act; and proposed s 219A (8) to be inserted into the 2005 Act:

20. The Committee notes that under Australian law, crimes are generally considered to have 2 aspects: a physical aspect (guilty act or actus reus) and a mental aspect (criminal intent or mens rea). At common law, there is a presumption that a prosecutor must show that an accused person had the requisite criminal intent to commit the offence. According to the Australian Law Reform Commission:

The requirement of a mental element is considered a hallmark of our criminal justice system. It is an overarching principle of criminal law that doing a forbidden act should not of itself render a person guilty of a crime; it must also be shown that the person had a guilty mind.⁶

21. The proposed s 219B and 219A (8) to be inserted into the 2005 Act do not include, either expressly or by implication, any defence or reasonable excuse for registered operators of vehicles used in connection with an offence for which an offending driver is found guilty under the proposed s 40 or the proposed s 41 (2) of the 1999 Act.
22. The Committee notes that a suspension warning notice has the effect for a period of 5 years after it is given. If the registered owner's vehicle is used in a second street racing or aggravated burnout offence within 5 years of the suspension warning notice, the RTA may suspend the vehicle's registration for up to 3 months. If a vehicle belonging to that registered owner is used in a third offence within 5 years from the date of the suspension warning notice, the vehicle may be forfeited to the Crown.

- 23. The Committee considers that, except in extraordinary circumstances, it is inappropriate for an absolute liability offence, particularly one that does not allow for a defence or reasonable excuse and where there is no provision for review rights. The Committee, therefore, considers the proposed s 219B and 219A (8) to be inserted into the 2005 Act, as absolute liability offences, with the absence of any defence of reasonable excuse, may amount to an undue trespass on individual rights, and refers this to Parliament.**

Issue: Excessive Punishment

Schedule 2 [4] amends s 41 of the 1999 Act to provide penalty increases. Schedule 2 [5]: increases the maximum penalty for the aggravated (burnout) offence from 7 penalty units to a maximum of 30 penalty units (in the case of a first offence) or 30 penalty units or imprisonment for 9 months or both (in the case of a second or subsequent offence).

24. The Committee notes that by way of comparison, The *Road Transport (Safety and Traffic Management) Act 1999* in the Australian Capital Territory consists of provisions on burnouts and other prohibited conduct (s 5B). From a preliminary search, the other Australian jurisdictions did not appear to have similar or comparable provisions on drag racing or burnouts. However, the ACT legislation provides for a maximum penalty if a prohibited substance had been placed on the surface of the road or near or under a tyre of the vehicle (such as petrol, oil, diesel fuel or any other flammable liquid or any other substance that increases the risk of death, injury or

⁶ *Sherra v De Rutzen* [1895] 1 QB 918 at p 921 quoted in *He Kaw Teh*

damage to property from the burnout), which is 30 penalty units only with no imprisonment. In any other case of burnout, the maximum penalty is 20 penalty units with no term of imprisonment.

25. The Committee also notes that other offences which attract a near comparable penalty range of 30 penalty units or imprisonment for 9 months include serious offences such as driving under the middle range prescribed concentration of alcohol, where the maximum penalty is 20 penalty units or imprisonment for 9 months or both in the case of a first offence or 30 penalty units or imprisonment for 12 months or both in the case of a second or subsequent offence: s 9 (3) in the *Road Transport (Safety and Traffic Management) Act 1999*. Section 12 of that Act: offences involving driving under the influence of alcohol or other drug includes the offence of the use or attempted use of a vehicle under the influence of alcohol or any other drug, which attracts a maximum penalty of 20 penalty units or imprisonment for 9 months or both in the case of a first offence; and in the case of a second or subsequent offence, a maximum penalty of 30 penalty units or imprisonment for 12 months or both.

- 26. However, the Committee takes into consideration by comparison of the above serious offences of mid-range drink driving and the use or attempted use of a vehicle under the influence of alcohol or drugs as carrying a similar penalty range to the proposed maximum penalty range for burnout offences under the proposed Bill, and contrasts the maximum penalty under the ACT legislation for similar burnout offences. Accordingly, the Committee considers that the increased penalties could be regarded as too severe, noting that the huge rise from a maximum penalty of 7 penalty units to a maximum of 30 penalty units for a first offence (or 30 penalty units or imprisonment for 9 months or both for a second or subsequent offence), may be an undue trespass on personal rights and liberties, and refers this to Parliament.**

Schedule 2 [5] –

- for proposed s 41 (2) (f): organise, promote or urge any person to participate in, or view, any group activity involving the operation of one or more vehicles for road and drag racing and other activities;
- for proposed s 41 (2) (g): photograph or film a motor vehicle being operated for road and drag racing and other activities for the purpose of organising or promoting the participation of persons in any such group activity ;
- the penalty is the same as for the driver offender of the aggravated offence (liable to a maximum of 30 penalty units in the case of a first offence), or 30 penalty units or imprisonment for 9 months or both (in the case of a second or subsequent offence).

- 27. The Committee considers that the same liability and maximum penalty imposed on the offender drivers of the vehicles in drag racing or burnouts (30 penalty units in the case of a first offence or 30 penalty units or imprisonment for 9 months or both in the case of a second or subsequent offence) as proposed for groups of people or associates that gather to watch, urge others on or who take photographs or films of burnouts and drag racing, but who were not the drivers, could be regarded as so severe as to trespass unduly on personal rights and liberties; and refers this to Parliament.**

7. TOTALIZATOR AMENDMENT BILL 2008

Date Introduced:	28 February 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Graham West MP
Portfolio:	Gaming and Racing; Sport and Recreation

Purpose and Description

1. This Bill amends the *Totalizator Act 1997* with respect to commission that a licensee may take on totalizator betting.

Background

2. From the Agreement in Principle when the Bill was introduced:

The main purpose of the proposal before the House is to amend the provisions of the *Totalizator Act 1997* relating to the limitations placed on the licensee, Tabcorp, in respect of the commission amounts that may be deducted from totalizator betting pools. This bill will amend s 69 of the Act to delete references to the overall annual commission cap of 16 per cent. These references will be replaced with a requirement for Tabcorp to establish individual product-based caps for each type of totalizator pool conducted. The intent of these changes is to update the current restrictions on totalizator commission pricing, which are outdated. The restrictions prevent stakeholders, including the racing industry, from achieving revenue growth as punting preferences change over time.

The new arrangements have been put forward by the industry, and are supported by Tabcorp...The arrangements are essentially the same as those approved in Victoria during 2007. The background to this issue goes back to the privatisation of the New South Wales TAB in 1998...In order to protect TAB punters from inappropriate pricing by the exclusive licence holder, currently Tabcorp, the Government imposed a limit on the amount of total commission, as a proportion of turnover, that the licensee could deduct from totalizator pools during any single financial year. This annual take-out rate was set under the *Totalizator Act* at 16 per cent. In addition, a further cap was set at 25 per cent for any individual betting pool.

In reality, these two measures allowed the TAB to move individual product rates up and down, within the constraints of the annual average limit of 16 per cent and a top rate for any one product of 25 per cent. The proposed changes will continue to protect TAB punters from any form of price gouging. The changes will leave the 25 per cent maximum take-out rate in place, and will replace the 16 per cent annual average cap with a defined cap for each betting pool currently offered by Tabcorp. Those caps will be set at the current rates being charged for each product, which are as follows: win, 14.5 per cent; place, 14.25 per cent; quinella, 14.75 per cent; exacta, 16.5 per cent; trifecta, 21 per cent; duet, 14.5 per cent; doubles, 17 per cent; first 4, 22.5 per cent; quadrella, 20 per cent; and FootyTAB, 25 per cent.

For clarity, this means that Tabcorp will not be able to raise rates for any existing

product...any new product that Tabcorp wants to introduce will require a new rate to be set by Tabcorp and approved by the Minister, which must fall below the 25 per cent maximum cap. I might stress that these are maximum caps and that Tabcorp will retain the ability to reduce an individual totalizator take-out at any time to enable the running of promotional sales at certain times of the year to stimulate wagering interest. I am informed that the New South Wales TAB shares the lowest take-out rates of any racing totalizator operator in the world. For example, the return to punters in Australia of around 84 per cent of total wagers compares with around 77 per cent in the United Kingdom, 69 per cent in France, 74 per cent in Japan and 79 per cent in the United States.

...The initiative is a timely one, given the New South Wales racing industry's recent struggle with the impacts of the equine influenza outbreak, which has in turn had a drastic effect on its finances.⁷

The Bill

3. The object of this Bill is to amend the *Totalizator Act 1997*:

(a) to remove the 16 per cent cap on commission that a licensee may deduct each financial year from the total amount invested in all totalizators conducted by the licensee in that year, and

(b) to provide for the rules made under that Act to prescribe the caps on commission that a licensee may deduct from the total amount invested in each totalizator conducted by the licensee.

The Bill also makes other consequential and minor amendments to the *Totalizator Act 1997*.

4. Outline of provisions

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 the date of assent to the proposed Act.

Clause 3 is a formal provision that gives effect to the amendments to the *Totalizator Act 1997* set out in Schedule 1.

Clause 4 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and s 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendments

S 69 of the *Totalizator Act 1997* (**the Principal Act**) currently limits the amount of commission that a licensee may deduct from the total amount invested in each totalizator conducted by the licensee on one or more events or contingencies to an amount not exceeding 25 per cent of the amount so invested. Section 69 also limits the amount of commission that a licensee may deduct each financial year from the total amount invested in all such totalizators conducted by the licensee in that year to 16 per cent of the amount so invested.

Schedule 1 [4] substitutes s 69 of the Principal Act to remove the 16 per cent cap on commission referred to above, and to provide for the rules made under the Act to prescribe the caps on commission that a licensee may deduct from the total amount invested in each totalizator conducted by the licensee. Under the proposed provision, the rules cannot

⁷ Graham West MP, Legislative Assembly Hansard, 28 February 2008

provide for a cap in respect of a totalizator that exceeds 25 per cent of the total amount invested in the totalizator.

Schedule 1 [3] amends s 53 of the Principal Act to require the rules referred to in proposed s 69 to be made.

Schedule 1 [6] inserts a transitional provision that provides that the removal of the 16 per cent cap has effect on and from the financial year commencing 1 July 2007.

Schedule 1 [5] enables regulations of a savings or transitional nature to be made as a consequence of the enactment of the proposed Act.

Schedule 1 [2] omits a redundant provision and **Schedule 1 [1]** makes a consequential amendment.

Issues Considered by the Committee

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| <p>5. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</p> |
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The Committee makes no further comment on this Bill.

Appendix 1: Index of Bills Reported on in 2008

	Digest Number
Conveyancing Amendment (Mortgages) Bill 2007*	1
Crimes Amendment (Drink and Food Spiking) Bill 2008	2
Energy Services Corporations Ownership (Parliamentary Powers) Bill 2008*	2
Food Amendment (Public Information on Offences) Bill 2008	2
Gaming Machines Amendment (Temporary Freeze) Bill 2008	2
Local Government Amendment (Election Date) Bill 2008	2
Marine Parks Amendment Bill 2007	1
Road Transport Legislation Amendment (Car Hoons) Bill 2008	2
TAFE (Freezing of Fees) Bill 2007*	1
Totalizator Amendment Bill 2008	2

Appendix 2: Index of Ministerial Correspondence on Bills

Bill	Minister/Member	Letter sent	Reply received	Digest 2007	Digest 2008
APEC Meeting (Police Powers) Bill 2007	Minister for Police	03/07/07		1	
Criminal Procedure Amendment (Vulnerable Persons) Bill 2007	Minister for Police	29/06/07		1	
Drug and Alcohol Treatment Bill 2007	Minister for Health	03/07/07	28/01/08	1	1
Guardianship Amendment Bill 2007	Minister for Ageing, Minister for Disability Services	29/06/07	15/11/07	1,7	
Mental Health Bill 2007	Minister Assisting the Minister for Health (Mental Health)	03/07/07		1	
Statute Law (Miscellaneous) Provisions Bill 2007	Premier	29/06/07	22/08/07	1,2	
Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2007	Minister for Police	03/07/07		1	

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2008

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Conveyancing Amendment (Mortgages) Bill 2007*					
Crimes Amendment (Drink and Food Spiking) Bill 2008				R	
Energy Services Corporations Ownership (Parliamentary Powers) Bill 2008*					
Food Amendment (Public Information on Offences) Bill 2008				R	
Gaming Machines Amendment (Temporary Freeze) Bill 2008	N				
Local Government Amendment (Election Date) Bill 2008					
Marine Parks Amendment Bill 2007					
Road Transport Legislation Amendment (Car Hoons) Bill 2008	R		R	R	
TAFE (Freezing of Fees) Bill 2007*					
Totalizator Amendment Bill 2008					

Key

- R Issue referred to Parliament
- C Correspondence with Minister/Member
- N Issue Note