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Legislation Review Committee

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* 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.

Part One – Bills

SECTION A: COMMENT ON BILLS

1. APPROPRIATION (BUDGET VARIATIONS) BILL 2004

Date Introduced:	17 March 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Michael Egan MLC
Portfolio:	Treasurer

Purpose and Description

1. This Bill appropriates additional amounts from the Consolidated Fund for recurrent services and capital works and services for the years 2003–2004 and 2002–2003 for the purpose of giving effect to certain Budget variations required by the exigencies of Government.

Background

2. In his second reading speech, the Parliamentary Secretary stated:

The bill has four key parts.

- First, account to Parliament on how the Treasurer's Advance has been applied for recurrent and capital expenditure.
- Second, seek an adjustment of the advance prior to the end of the current financial year.
- Third, seek appropriation to cover expenditure approved by the Governor under section 22 of the Public Finance and Audit Act 1983.
- Fourth, seek additional appropriations for payments which are intended to be made in the current financial year where no provision was made in the annual Appropriation Bill.

Schedule 1 to the bill covers appropriations for 2003-04, and schedule 2 covers payments made in 2002-03. The payments from the last financial year have already been brought to account in the agencies' audited financial statements and have no impact on the published budget result for that year.¹

The Bill

3. The Bill varies the 2003–2004 Budget by:
 - appropriating \$290,523,000 in adjustment to the vote “Advance to the Treasurer” [cl 3];

¹ Mr Graham West MP, Parliamentary Secretary, *Parliamentary Debates (Hansard)* Legislative Assembly, 17 March 2004.

Appropriation (Budget Variations) Bill 2004

- appropriating \$177,399,000 required for the exigencies of Government during the year 2003–2004 under s 22(1) of the *Public Finance and Audit Act 1983*² [cl 4];
 - appropriating \$135,300,000 for recurrent services.
4. The Bill varies the 2002–2003 Budget by:
- appropriating \$186,255,000 in adjustment to the vote “Advance to the Treasurer” [cl 6];
 - appropriating \$779,774,000 required for the exigencies of Government during the year 2002–2003 under s 22(1) of the *Public Finance and Audit Act 1983*³ [cl 4];
5. Tables setting out the details of the appropriations made by the Bill are at Schedules 1 and 2 of the Bill.
6. The Bill also validates any expenditure authorised by the Bill but that was made prior to the assent of the ensuing Act [cl 9 and 10].
7. The Bill commences on the date of assent.

Issues Considered by the Committee

8. The Committee did not identify any issues arising under s 8A(1)(b) of the *Legislation Review Act 1987*.

The Committee makes no further comment on this Bill.

² Subsection 22(1) of the *Public Finance and Audit Act 1983* provides:

Notwithstanding section 21, where, after an Act is passed in respect of a financial year appropriating money out of the Consolidated Fund to meet the requirements of that financial year, the exigencies of Government so require, the Treasurer may, with the approval of the Governor, determine that there shall be paid from the Consolidated Fund, in anticipation of appropriation by Parliament, such additional sums as may be necessary in the public interest to provide for expenditure of a recurrent nature or for capital works and services.

³ Subsection 22(1) of the *Public Finance and Audit Act 1983* provides:

Notwithstanding section 21, where, after an Act is passed in respect of a financial year appropriating money out of the Consolidated Fund to meet the requirements of that financial year, the exigencies of Government so require, the Treasurer may, with the approval of the Governor, determine that there shall be paid from the Consolidated Fund, in anticipation of appropriation by Parliament, such additional sums as may be necessary in the public interest to provide for expenditure of a recurrent nature or for capital works and services.

2. BOTANY BAY NATIONAL PARK (HELICOPTER BASE RELOCATION) BILL 2004

Date Introduced:	17 March 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Carl Scully MP
Portfolio:	Housing & Roads

Purpose and Description

1. This Bill enables the relocation of the Southern Region SLSA Helicopter Rescue Service from the former Prince Henry Hospital site to an area within Botany Bay National Park by:
 - (a) revoking the reservation under the *National Parks and Wildlife Act 1974* of certain land as part of Botany Bay National Park;
 - (b) vesting that land in the Crown as Crown land within the meaning of the *Crown Lands Act 1989*; and
 - (c) facilitating the use of that land for the purposes of a helicopter base for emergency aerial evacuation, retrieval and rescue.

Background

2. According to the Parliamentary Secretary's second reading speech:

In 2002 it became apparent that the rescue helicopter services currently provided by the Southern Region (SLSA) Helicopter Rescue Service Pty Limited, referred to as the Rescue Service, could no longer operate from their temporary facilities at the former Prince Henry Hospital site. More than 30 alternative sites were reviewed but all were deficient in some way. A site was finally found within the Botany Bay National Park. However, the National Parks and Wildlife Act does not permit the construction of such facilities in a national park. Accordingly, on 7 October 2003 Cabinet approved the excision of land at Cape Banks from the Botany Bay National Park [BBNP], provided that such excision is only for the purpose of providing rescue helicopter services. By permitting passage of this bill public safety will continue to be safeguarded.

Considerations

3. The Parliamentary Secretary noted a number of issues considered as part of the decision to locate the helicopter service in Botany Bay National Park:

Issues such as native title, vesting of title and the interest of other competing users of Botany Bay National Park have been addressed. The boundary of the excised area took a considerable degree of time and effort to finalise in order not to include the general car park opposite the pistol club. The car park is heavily utilised by visitors to Botany Bay National Park, providing the only public access to the northern section of the coast track. Anglers, whale watchers and bushwalkers are all regular users. In addition, this area will shortly be gazetted as an Aboriginal place. Accordingly, this section of the park was not excised and remains within Botany Bay National Park, nor

Botany Bay National Park (Helicopter Base Relocation) Bill 2004

does the bill excise the access road that runs adjacent to the proposed helipad site. This road is the main route used by the DEC and emergency services to access the coastal section of Botany Bay National Park and is also the main, but not the only, pedestrian access to the coast.

Accordingly, the road has been retained within Botany Bay National Park and is not excised from the Botany Bay National Park by this bill. Instead the rescue service will have access to the rescue helicopter base by way of easement and licence over this road.⁴

The Bill

4. This Bill revokes the reservation under the *National Parks and Wildlife Act 1974* of the land to which this Bill applies⁵ as part of Botany Bay National Park [proposed s 6].
5. Upon this revocation, the land becomes ***Crown land***.⁶
6. However the Bill excludes the operation of Part 3, and s 35⁷ of the *Crown Lands Act 1989*, with respect to the lease or granting of a license over this land for the following purposes:
 - (a) the taking off, landing and movement of helicopters used for emergency evacuation, retrieval or rescue;
 - (b) ***helicopter facilities***⁸ for those helicopters; and
 - (c) accommodation for the crew of those helicopters, including pilots, medical practitioners, nurses and paramedical workers [proposed s 7].

Additionally, an ***environmental planning instrument***⁹ cannot prohibit, require development consent for, or otherwise restrict, the development of this land with respect to the aforementioned functions of the land.

⁴ Mr Graham West MP, Parliamentary Secretary, *NSW Parliamentary Debates (Hansard)*, Legislative Assembly, 17 March 2004.

⁵ PLAN OF PART LOT 5209 DP704508 identified as Plan No P572703-L1, dated 13.11.03 and deposited in the head office of the Department of Lands: s 5

⁶ ***Crown land*** is defined by s 3(1) of the *Crown Lands Act 1989* as meaning land that is vested in the Crown or was acquired under the Closer Settlement Acts as in force before their repeal, not in either case being:

(a) land dedicated for a public purpose, or

(b) land that has been sold or lawfully contracted to be sold and in respect of which the purchase price or other consideration for the sale has been received by the Crown.

⁷ Part 3 of the *Crown Lands Act 1989* provides for the assessment of Crown Land, consisting of the preparation of an inventory of Crown land, an assessment of the capabilities of the land, and the identification of suitable uses for the land and, where practicable, the preferred use or uses. Section 35 provides that the power of the Minister to sell, lease, exchange or otherwise dispose or deal with Crown land, or to grant easements or rights-of-way over, or licences or permits in respect of Crown land may not be exercised unless the Minister is satisfied that the land has been assessed under Part 3 of the Act.

⁸ ***Helicopter facilities*** is defined by s 4(1) of the Bill as including buildings and installations for the parking, fuelling, servicing and maintenance of helicopters.

⁹ ***Environmental Planning Instrument*** is defined by s 4 of the *Environmental Planning and Assessment Act 1979* as a State environmental planning policy, a regional environmental plan, or a local environmental plan, and except where otherwise expressly provided by the Act, a deemed environmental planning instrument.

7. This Bill provides that the following constitute an essential public purpose for the purposes of s 36 of the *Aboriginal Land Rights Act 1983*, which has the effect of providing that this land is not claimable crown land under that Act:
- (a) development for the purposes of the taking off, landing and movement of helicopters used for emergency evacuation, retrieval or rescue;
 - (b) development for the purposes of helicopter facilities for those helicopters; and
 - (c) development for the purposes of accommodation for the crew of those helicopters, including pilots, medical practitioners, nurses and paramedical workers [proposed s 9].

This Bill will not, however, extinguish any native title rights and interests existing in relation to this land which exist immediately prior to this land becoming vested in the Crown [proposed s 11]¹⁰.

8. This Bill also provides that the Minister administering the *National Parks and Wildlife Act 1974*¹¹ may grant an easement or right-of-way over this land for the purpose of enabling access or the provision of services to this land [s 10].

Issues Considered by the Committee

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

Commencement by proclamation: Clause 2

9. The proposed Act is to commence on a day or days to be appointed by proclamation.
10. The Committee notes that providing for an Act to commence on proclamation delegates to the government the power to commence the Act on whatever day it chooses, or not to commence the Act at all.
11. Whilst there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, it can give rise to an inappropriate delegation of legislative power.
12. The Committee has been advised that the reason for commencement by proclamation is to facilitate the administrative handover of the land concerned between the Department of Environment and Conservation to the Department of Lands. The Act will be proclaimed as soon as practicable after assent.

13. The Committee considers the need to facilitate the administrative handover of the land between Government Departments is a sufficient reason to delay the commencement of this Act.

The Committee makes no further comment on this Bill.

¹⁰ This provision, however does not affect any extinguishment of native title rights and interests by operation of either the *Native Title Act 1933* (Cth) or the *Native Title (New South Wales) Act 1994*.

¹¹ This is currently the Minister for the Environment.

3. CIVIL LIABILITY AMENDMENT (OFFENDER DAMAGES) BILL 2004

Date Introduced:	18 March 2004
House Introduced:	Legislative Assembly
Minister Responsible:	Hon John Hatzistergos MLC
Portfolio:	Justice

Purpose and Description

1. The Bill's object is to amend the *Civil Liability Act 2002* [the Act] to impose special restrictions on the damages recoverable by a person for personal injury resulting from the negligence of a **protected defendant** suffered while the person was an **offender in custody**.
2. An *offender in custody* is a prison inmate, periodic detainee, home detainee or person performing a community service order [proposed s 26A].
3. *Protected defendants* are:
 - (a) the Crown (within the meaning of the *Crown Proceedings Act 1988*¹²) and its servants;
 - (b) a Government department and members of staff of a Government department;
 - (c) a public health organisation (within the meaning of the *Health Services Act 1997*) and members of staff of a public health organisation;
 - (d) any person having public official functions or acting in a public official capacity (whether or not employed as a public official), but only in relation to the exercise of the person's public official functions; and
 - (e) a management company or submanagement company (within the meaning of the *Crime (Administration of Sentences) Act 1999*) and members of staff of such a company [proposed s 26A].
4. The Bill extends to children in detention centres and the staff of those detention centres, and to children performing work under community service orders [proposed s 26A(1)(d) & (e)].

Background

5. The Bill's second reading speech refers to previous legislation limiting the liability of defendants in respect of claims for negligence. In addition to the *Civil Liability Act*

¹² Pursuant to s 3 of the *Crown Proceedings Act 1988*, **crown** means the Crown in right of New South Wales, and includes:

- (a) the Government of New South Wales, and
- (b) a Minister of the Crown in right of New South Wales, and
- (c) a statutory corporation, or other body, representing the Crown in right of New South Wales.

2002, changes to the law of negligence have been introduced by the *Civil Liability (Personal Responsibility) Act 2002*¹³ and the *Civil Liability Amendment Act 2003*.¹⁴

6. According to the second reading speech:

The amendments the bill introduces are in response to concerns from one particular area—namely, offenders who sue the State, through the Department of Corrective Services or the Department of Juvenile Justice, for injuries that befall them whilst they are in custody or performing work under community service orders...

Under the amendments proposed by this bill, liability will be assessed uniformly, injuries will be assessed uniformly, catastrophic injuries will result in compensation to no greater extent than catastrophic injuries suffered by injured workers in civilian employment, minor injuries will not be eligible for compensation, and other injuries will be eligible for limited compensation...

The bill also removes the anomalies in the existing mixture of legislation and common law governing claims by inmates and offenders against the State. At present, a successful claim of negligence can be assessed in a number of ways. An offender injured performing community service work is assessed differently to (*sic*) an offender injured performing other work or an offender suffering an injury in an accident within a correctional or detention centre. Two offender workers suffering identical injuries may receive very different awards of damages depending on the type of work they were doing when injured. Under the scheme to be introduced by this bill, there will be no unfairness between compensation available to different groups of offenders, and no offender will receive compensation that is unavailable to a law-abiding worker suffering the same injury.¹⁵

The Bill

Restrictions on damages

7. The Bill inserts a proposed Part 2A in the Act.

The proposed Part imposes special restrictions on the damages that can be awarded for the death of or injury to an offender in custody caused by the negligence of a protected defendant.

8. The special restrictions are as follows:

- **no** damages can be awarded unless the relevant injury results in the death of the offender, or in a degree of permanent impairment of at least 15% [proposed s 26C]. The degree of impairment will be assessed in the same manner as under the *Workplace Injury Management and Workers Compensation Act 1998* [proposed s 26D].¹⁶

¹³ The amendments made by the *Civil Liability Act (Personal Responsibility) Act 2002* were based on the recommendations made in the August 2002 *Review of the Law of Negligence Report*, prepared for the Commonwealth Minister for Revenue and Assistant Treasurer under the chairmanship of Hon Justice Ipp.

¹⁴ The *Civil Liability Amendment Act 2003* was reported upon in the Legislation Review Committee's *Digest* No.7, 1 December 2003, p.17.

¹⁵ Hon D Beamer MP, *NSW Parliamentary Debates (Hansard)*, Legislative Assembly, 18 March 2004.

¹⁶ Section 151H of the *Workers Compensation Act 1987* provides that no damages may be awarded unless an injury results in the death of the worker or in a degree of permanent impairment of the injured worker that is

Civil Liability Amendment (Offender Damages) Bill 2004

- damages for economic loss for past and future loss of earnings will be limited in the same way as those damages are limited under the *Workers Compensation Act 1987* for damages for workplace injury [proposed s 26E]¹⁷;
 - in assessing future loss of earnings, earning capacity after age 65 is to be disregarded, in line with similar provisions for damages for workplace injury [proposed s 26F]¹⁸; and
 - damages for non-economic loss are limited to the equivalent statutory workers compensation that would be payable for workplace injury [proposed s 26I].¹⁹
9. The new restrictions will extend to *existing* claims unless proceedings on the claim were commenced before 15 January 2004 - the date of the Minister's announcement of the proposed restrictions²⁰ - or an award of damages has been made on the claim before the date of assent [proposed Sch 1 [16(2)(a) & (c)]].
10. If the claim concerns an injured child, the new restrictions will *not* apply if proceedings were commenced before the introduction of the Bill into Parliament [proposed Sch 1 [16(2)(b)]].
11. Proposed Part 2A will not restrict an award of damages to relatives of a deceased offender under the *Compensation to Relatives Act 1897*, or an award of damages to a third person for mental harm²¹ arising from the incident that resulted in the offender's injuries, as long as the third person was not an offender in custody at the time of the incident [proposed s 26B(2)].

Restitution payments

12. The Bill allows a protected defendant to withhold and deduct from the damages payable to an offender any amount payable by the offender pursuant to an order for restitution under the *Victims Support and Rehabilitation Act 1996* [proposed 26J].²²
13. Where an amount has been ordered to be paid by an offender pursuant to a *provisional* order for restitution, the protected defendant may, while the provisional order is pending, withhold that amount from the damages payable to the offender [proposed s 26J(3)].

at least 15%. In proceedings, the degree of impairment is a question of fact to be determined by the trial judge: see, eg, *Berrica Estate v Anderson* [2003] NSWCA 23 (11 February 2003).

¹⁷ See s 35 of the *Workers Compensation Act 1987*.

¹⁸ See s 52 of the *Workers Compensation Act 1987*.

¹⁹ See Division 4 (Compensation for non-economic loss) of Part 3 of the *Workers Compensation Act 1987*.

²⁰ Hon J Hazistergos MLC, "New laws to limit inmate negligence claims", *Media Release*, 15 January 2004.

²¹ *Mental harm* is defined in s 31 of the *Civil Liability Act 2002* as "a recognised psychiatric illness".

²² Division 8 of Part 2 of the *Victims Support and Rehabilitation Act 1996* provides for the payment of restitution to a victim by an offender. Section 3 of that Act states that its objects are to:

- (a) provide support and rehabilitation for victims of crimes of violence by giving effect to an approved counselling scheme and a statutory compensation scheme;
- (b) enable compensation paid under the statutory compensation scheme to be recovered from persons found guilty of the crimes giving rise to the award of compensation;
- (c) impose a levy on persons found guilty of crimes punishable by imprisonment for the purpose of funding the statutory compensation scheme; and
- (d) give effect to an alternative scheme under which a court may order the person it finds guilty of a crime to pay compensation to any victim of the crime.

14. According to the second reading speech, the Department of Corrective Services and the Attorney General's Department will establish a protocol to ensure that the director of the Victims Compensation Fund is aware of any offender who sues the Department of Corrective Services. The director can then advise the department of any amount owed by the offender under a restitution order, in order for that amount to be recovered before the offender receives any damages.²³

Work by offenders

15. The Bill also amends s 6 and s 84 of the *Crimes (Administration of Sentences) Act 1999* [CAS Act] to make it clear that the work which offenders can be ordered to perform is *any* work considered suitable, without the need to formally assess offenders as to work that is suitable for their personal capacity [Sch 2.2].
16. Nonetheless, the Bill inserts proposed s 6(3) and s 84(1A) into the CAS Act to ensure that an offender is not required to carry out work or community service which the offender is not capable of carrying out.

Issues Considered by the Committee

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

Issue: Proposed s 26C Limit of rights to compensation

17. Proposed s 26C provides that no damages may be awarded (whether for economic or non economic loss) unless the injury results in the death of the offender, or in a degree of permanent impairment of the offender that is at least 15%.
18. This involves a considerable curtailment of a victim's right to gain compensation for the negligent acts of others, given that an impairment of just less than 15% constitutes a fairly serious injury.
19. This amendment reflects the position under s 151H of the *Workers Compensation Act 1987*. Section 151H was inserted into that Act by the *Workers Compensation Legislation Further Amendment Act 2001* in the wake of the inquiry into common law compensation claims headed by Hon Justice Terry Sheahan.
20. That inquiry recommended that the required degree of impairment be set at 20%, but after consultation with the NSW Labor Council, the Government accepted that a threshold of 15% impairment was appropriate.²⁴
21. The Committee notes that correctional authorities – which will fall within the definition of *protected authorities* under proposed s 26A - have a common law duty of care to inmates to take reasonable steps to protect their safety.²⁵ The scope of this duty of care has been described as follows:

²³ Hon D Beamer MP, *NSW Parliamentary Debates (Hansard)*, Legislative Assembly, 18 March 2004.

²⁴ Hon R S Amery MP, *NSW Parliamentary Debates (Hansard)*, Legislative Assembly, 27 November 2001.

²⁵ See *Ellis v Home Office* [1953] 2 All ER 149; *Sandery v South Australia* (1987) 48 SASR 500. In *Howard v Jarvis* (1958) 98 CLR 177, the High Court held that a police officer owed a common law duty of care to exercise reasonable care of prisoners safety while a prisoner was in custody.

When one person is in the lawful custody of another, whether that be voluntarily, as is usually the case in a hospital, or *involuntarily, as when a person is detained by the police or by prison authorities* ... there is a duty upon the person having custody of another to take all reasonable steps to avoid acts or omissions which he could reasonably foresee would be likely to harm the person for whom he is responsible.²⁶

- 22. The Committee notes that the abolition of a right to damages for a degree of permanent impairment of less than 15% trespasses on the right to compensation for the negligent acts of others.**
- 23. The Committee also notes that this amendment reflects the current position under the *Workers Compensation Act 1987*.**
- 24. The Committee notes that correctional authorities have a common law duty of care in relation to offenders in custody.**
- 25. The Committee refers to Parliament the question of whether the proposed amendment trespasses unduly on personal rights and liberties.**

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

Issue: Schedule 1 [5]

Retrospectivity

26. The Bill inserts a new cl 16 into Sch 1 of the Act. Proposed cl 16 provides that:
- (1) Part 2A of this Act extends to an award of personal injury damages that relates to an injury received, or to a death resulting from an injury received, whether before or after the commencement of that Part.
 - (2) However, Part 2A of this Act does not apply to or in respect of:
 - (a) an award of damages in proceedings commenced in a court before 15 January 2004, or
 - (b) an award of damages in proceedings commenced in a court before the date of introduction into Parliament of the Bill for the *Civil Liability Amendment (Offender Damages) Act 2004* if the award is in respect of an injury (or death resulting from an injury) to a person received while the person was a detainee under the *Children (Detention Centres) Act 1987* or while performing community service work under a children's community service order as provided by the *Children (Community Service Orders) Act 1987*, or
 - (c) an award of damages, or settlement or consent order in respect of damages, made before the date of assent to the *Civil Liability Amendment (Offender Damages) Act 2004*.
27. These provisions therefore treat the amendments contained in the Bill as having taken effect either from:

²⁶ *Kirkham v Chief Constable of the Greater Manchester Police* [1990] 2 WLR 987, per Farquharson LJ at 996. Emphasis added.

Civil Liability Amendment (Offender Damages) Bill 2004

- the date the Minister announced his intention to introduce the amendments in his Ministerial Statement [15 January 2004];
 - the date on which they were introduced into Parliament [18 March 2004]; or
 - the date of assent.
28. The second reading speech notes that this retrospectivity is “necessary to prevent a flood of speculative claims”.²⁷
29. The Committee notes that the Government adopted a similar stance on the introduction of the *Civil Liability Act 2002*, the *Civil Liability (Personal Responsibility) Act 2002* and the *Civil Liability Amendment Act 2003*.
30. The Senate Scrutiny of Bills Committee has held that legislation of this nature:
- carries with it the assumption that citizens should arrange their affairs in accordance with announcements made by the Executive rather than in accordance with the laws made by the Parliament. It treats the passage of the necessary retrospective legislation 'ratifying' the announcement as a pure formality. It places the Parliament in the invidious position of either agreeing to the legislation without significant amendment or bearing the odium of overturning the arrangements which many people may have made in reliance on the Ministerial announcement. Moreover, quite apart from the debilitating effect of the practice on the Parliament, it leaves the law in a state of uncertainty... The legislation when introduced may differ in significant details from the terms of the announcement. The Government may be unable to command a majority in the Senate to pass the legislation giving effect to the announcement or it may lose office before it has introduced the relevant legislation, leaving the new Government to decide whether to proceed with the proposed change to the law.²⁸

- 31. The Committee will always be concerned where legislation is taken to have commenced on the date of a Ministerial Statement or when it was introduced into Parliament, rather than on or after the date of assent.**
- 32. The Committee notes that the *Civil Liability Amendment Act 2003* operates retrospectively in a similar manner.**
- 33. The Committee is concerned that some individuals may have commenced claims for common law damages, and thereby incurred significant costs, unaware of the Ministerial Statement of 15 January 2004.**
- 34. The Committee notes that the Bill will have the effect of imposing special restrictions on the damages that can be awarded to an offender in custody – except a child detainee - caused by the negligence of a protected defendant in any actions commenced after 15 January 2004, but not yet decided prior to the Bill receiving the Royal Assent.**
- 35. The Committee notes that restrictions on claims made by child detainees will commence from 18 March 2004, the date on which the Bill was introduced into Parliament.**

²⁷ Hon D Beamer MP, *NSW Parliamentary Debates (Hansard)*, Legislative Assembly, 18 March 2004.

²⁸ Senate Scrutiny of Bills Committee, *Annual Report 1986-87*, at 12-13.

36. The Committee refers to Parliament the question of whether the retrospective effects of these provisions trespass unduly on personal rights and liberties.

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

Issue: Clause 2 Commencement by proclamation

37. The ensuing Act is to commence on a day or days to be appointed by proclamation.
38. The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it chooses after assent or not to commence the Act at all.
39. The Minister's office has advised the Committee that the delay in commencement is linked to the retrospective nature of the legislation.

40. The Committee has written to the Minister seeking his advice as to the likely timeframe for the commencement of the ensuing Act.

The Committee makes no further comment on this Bill.

4. LOCAL GOVERNMENT (COUNCIL AND EMPLOYEE SECURITY) BILL 2004

Date Introduced:	18 March 2004
House Introduced:	Legislative Council
Minister Responsible:	The Hon Tony Kelly MLC
Portfolio:	Local Government

Purpose and Description

1. This Bill amends the *Local Government Act 1993*:
 - (a) to enable a local council to apply for a ministerial determination of a percentage by which the council's general income, or its charges for domestic waste management services, may be increased over a period of up to 7 years;
 - (b) to extend the circumstances in which local government elections may be postponed;
 - (c) to extend protections given to staff transferred to the employment of another council to non-transferred staff who were employed by the affected councils at the time of the staff transfer;
 - (d) to provide that staff of a council that is affected by an amalgamation or alteration of boundaries cannot be relocated, within the following 3 years, outside the relevant council boundaries as they existed before the amalgamation or alteration took effect, unless the staff give consent or a relocation would not cause unreasonable hardship because of the distance concerned; and
 - (e) to require a council affected by an amalgamation or alteration of boundaries and employing staff at a rural centre to maintain staff numbers (excluding senior staff and certain temporary staff) at the rural centre as far as is reasonably practicable.

Background

2. In his second reading speech,²⁹ the Minister said that the “bill replaces the *Local Government Amendment Bill 2003*, which was introduced into Parliament in November last year, but did not pass the House.”

According to the Minister, since then further discussion, negotiation and consultation has taken place with stakeholders.

²⁹ The Hon Tony Kelly MLC, Minister for Local Government, Second Reading Speech, Legislative Council, *Parliamentary Debates (Hansard)*, 18 March 2004.

The Bill

Variation of local council rates

3. In his second reading speech, the Minister stated that “[c]urrently, a council may apply to the Minister to increase its general income from rates by a specific percentage or a special variation, above the rate-pegging limit.”

The amendments will “allow councils to apply for a series of annual percentage increases above the rate-pegging for a period of up to 7 years on a fluctuating basis.”³⁰

4. Schedule 1 sets out the procedure for making a determination for an individual council of the special percentage by which the council’s general income or its charges for domestic waste management may be increased over a period of up to 7 years.
5. Under the Bill, where the percentage specified under rate pegging is greater than the percentage specified under the special variation determination, the greater amount will apply [proposed section 508A(6)].

Deferral of local council elections

6. The Bill provides for the Minister to postpone council elections in three situations:
- (1) an amalgamation or boundary proposal is being formulated or is under consideration or has been made;
 - (2) the council is the subject of an investigation under the *Local Government Act*, a public inquiry or investigation by an authority under this or any other Act³¹; or
 - (3) a matter affecting the boundaries of the council’s area is under consideration by the Boundaries Commission.³²
7. Under the Bill, elections may be postponed for a period of 12 months in the first instance. They may be further postponed for an additional period of 12 months if:
- (1) a proposal for amalgamation or changes to boundaries is being formulated but has not been made; and
 - (2) the Minister is satisfied that substantial progress has been made in the formulation of the proposal.³³

³⁰ The Hon Tony Kelly MLC, Minister for Local Government, Second Reading Speech, Legislative Council, *Parliamentary Debates (Hansard)*, 18 March 2004.

³¹ For an “authority” under the *Local Government Act*, see subsection 430(1) which provides that the Director-General may, at the request of the Minister or on the Director-General’s own initiative, authorise any person (referred to in this Part as a Departmental representative) to investigate any aspect of a council or of its work and activities.

³² See schedule 2, clause 2, proposed section 318B.

³³ See schedule 2, clause 2, proposed subsection 318B(3).

8. The Minister may also revoke an order to postpone council elections [proposed section 318C]. In this case, the elections must be held on a Saturday occurring not less than 3 months, and not more than 6 months, after the day on which the revocation order is made [proposed section 318C(2)].

According to the Minister, this provision balances the need for flexibility “to accommodate the individual circumstances of councils and their communities and the need for certainty in the electoral planning process.”³⁴

Council staff transfers

9. The entitlements of employees (other than senior members of staff) who are transferred from one council to another as a result of an amalgamation or boundary alteration continue on the same terms and conditions that applied to those staff members immediately before the transfer [schedule 3, clause 3].³⁵

Under the Local Government Act

senior staff of a council means the general manager of the council and the holders of all other positions identified in the council’s organisation structure as senior staff positions.³⁶

According to the Minister,

In order to be identified in the council's organisational structure as senior staff, a staff member must be employed at SES level 1 or above. That means that a staff member must be earning more than \$125,000 per annum.³⁷

10. In addition, the employment of staff (other than senior members of staff) may not be terminated within 3 years after the transfer day on the ground of redundancy arising from the staff transfer [schedule 3, clause 5].
11. Under the Bill, non-senior staff members who are transferred must not be required by the council employing them to be based outside the boundaries of the area of his or her former council.

This has effect for three years following the transfer, unless the staff member gives written consent, or such a requirement would not cause unreasonable hardship because of the distance required to be travelled to the proposed new work place [proposed section 354I].

12. The Bill amends section 354G of the Act. Currently, that section applies if:
- (a) a council employs transferred staff members;

³⁴ The Hon Tony Kelly MLC, Minister for Local Government, Second Reading Speech, Legislative Council, *Parliamentary Debates (Hansard)*, 18 March 2004.

³⁵ This is currently the position under the *Local Government Act*, section 354D.

³⁶ *Local Government Act*, Dictionary.

³⁷ The Hon Tony Kelly MLC, Minister for Local Government, Second Reading Speech, Legislative Council, *Parliamentary Debates (Hansard)*, 18 March 2004.

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- (b) within 12 months after the transfer day, the general manager proposes to make an appointment to a position within the organisational structure of the council, other than a senior staff position; and
 - (c) a transferred staff member (other than a senior staff member) was, immediately before the transfer day, performing substantially the same duties for the staff member's former council as are required to be performed in the position to be filled.
13. If the section applies, the council, among other things, must not externally advertise the position. In addition, a transferred staff member who applies for the position must be considered for appointment to the position in preference to any other applicant for the position who is not such a person.
14. The Bill amends section 354G so that it applies for a period of 3 years after the transfer date rather than 12 months.
15. These provisions cover all non-senior staff, except those on fixed-term contracts for specific projects.
16. According to the Minister,
- Non-senior staff who are employed under performance-based contracts are not captured within [the definition of senior staff], with the exception ... of ... project contract staff. Consequently, they are covered by any employment protection provisions that relate to non-senior staff. It is the Government's intention that these provisions be applied in the same way to non-senior staff on fixed-term contracts. For example, if a non-senior staff member had served one year of a two-year contract when affected by structural reform, the period of employment would be extended for the three-year period.³⁸

Maintenance of staff numbers in rural centres

17. Amendments made in Schedule 4 require a council affected by an amalgamation or alteration of boundaries and employing staff at a rural centre to maintain staff numbers (other than senior staff) at the rural centre as far as is reasonably practicable [schedule 4, clause 1, proposed section 218CA].

The Bill defines **rural centre** as “a centre of population of 5,000 people or fewer” or such geographic areas as are prescribed by regulations [Schedule 3, clause 2]. The Minister noted that this regulation making power will allow particular townships which fall just above the 5,000 threshold to be prescribed as rural centres.

The Minister also stated that:

that figure of 5,000 residents is intended to relate to those centres of population that are “identifiable towns or contiguous built up areas surrounded by or adjacent to non-urban areas”, not the outlying areas around a town or a council area.³⁹

³⁸ The Hon Tony Kelly MLC, Minister for Local Government, Second Reading Speech, Legislative Council, *Parliamentary Debates (Hansard)*, 18 March 2004.

³⁹ The Hon Tony Kelly MLC, Minister for Local Government, Second Reading Speech, Legislative Council, *Parliamentary Debates (Hansard)*, 18 March 2004.

Commencement

18. With the exception of Schedule 3, the Bill commences on assent.
19. Schedule 3, which contains provisions relating to conditions for staff transfers, is taken to have commenced on 1 January 2004.

Issues Considered by the Committee**Trespasses on personal rights and liberties [s 8A(1)(b)(i) LRA]****Retrospectivity: Subclause 2(3)**

20. Subclause 2(3) provides that schedule 3, is taken to have commenced on 1 January 2004. The affected provisions give certain protection for employees of councils that are amalgamated or abolished. According to the Minister, these provisions are retrospective to cover employees of councils that “underwent structural reform earlier this year”.⁴⁰

21. **The Committee will always be concerned with any retrospective effect of legislation which impacts on personal rights.**
22. **However, the Committee is of the view that, in this case, the retrospective commencement of schedule 3 is advantageous to those affected and does not unduly trespass on their personal rights or liberties.**

Delegation of legislative powers [s 8A(1)(b)(iv) LRA]**Prescribing that the Act does not apply: proposed s 218CA**

23. The provision maintaining staff numbers in rural centres ceases to have effect in such circumstances as may be prescribed by the regulations [proposed subsection 218CA(3)].
24. This is a significant delegation of legislative power, as it allows regulations to provide that a council in a rural centre that is affected by an amalgamation or alteration of boundaries does not have to maintain staff numbers.
25. At the same time, the regulation making power provides flexibility to allow for circumstances where the Minister considers it to be against the public interest to require the maintenance of staff numbers in a rural centre.

26. **It appears to the Committee that there may be occasions when the public interest would require the waiving of the requirement to maintain staff numbers in rural centres.**

⁴⁰ The Hon Tony Kelly MLC, Minister for Local Government, Second Reading Speech, Legislative Council, *Parliamentary Debates (Hansard)*, 18 March 2004.

27. Given that any prescribed exemption from the requirement would be disallowable by either House of Parliament, the Committee does not consider this to be an inappropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

5. PARLIAMENTARY ELECTORATES AND ELECTIONS AMENDMENT (PROHIBITION ON VOTING BY CRIMINALS) BILL 2004*

Date Introduced:	11 March 2003
House Introduced:	Legislative Assembly
Member Responsible:	Mr Andrew Humpherson MP
Portfolio:	Private Member's Bill

Purpose and Description

1. The Bill's object is to disqualify anyone who has been convicted of an offence and is serving a sentence from voting in a New South Wales election.
2. The disqualification would apply to *any* person who is:
 - serving a sentence by way of full-time detention, periodic detention or home detention; or
 - on remand pending sentencing; or
 - subject to a parole order or community service order.

Background

3. At present, under s 21(b) of the *Parliamentary Electorates and Elections Act 1912*, a person is disqualified from voting only if the person has been sentenced to imprisonment for 12 months or more and is actually in prison, serving that sentence.
4. The second reading speech provided the following background to the private member's Bill:

The right to vote is a privilege for any citizen in this State. The right to influence the outcome of the democratic processes at a State, parliamentary or local government level is a significant privilege...This bill seeks to take away the privilege to vote from those who have not respected the law, those who have not respected the rights and property of other citizens.

A number of people are serving punishment imposed by the justice system because they have broken the law and been convicted. This bill provides that while they are completing a sentence involving full-time, weekend or home detention they are denied the right to participate in democratic processes... The Opposition does not believe that those serving a punishment having not respected the rights of their fellow citizens should retain the right to vote while serving a sentence.⁴¹

⁴¹ Mr A Humpherson MP, *NSW Parliamentary Debates (Hansard)*, Legislative Assembly, 11 March 2003.

Commonwealth provisions

5. Section 93(8) of the *Commonwealth Electoral Act 1918* (Cth) provides that:

A person who:

- (a) by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting; or
- (b) is serving a sentence of 5 years or longer for an offence against the law of the Commonwealth or of a State or Territory; or
- (c) has been convicted of treason or treachery and has not been pardoned;

is not entitled to have his or her name placed on or retained on any Roll or to vote at any Senate election or House of Representatives election.

6. On 26 November 1998, the *Electoral and Referendum Bill (No 2) 1998* was introduced into the House of Representatives, which included a provision to amend s 93(8) to deny all prisoners the right to vote at Federal elections.⁴²

The *Electoral and Referendum Bill (No 2) 1998* (Cth) contained a number of reforms arising out of the recommendations of the June 1997 Report of the Joint Standing Committee on Electoral Matters on the conduct of the 1996 Federal Election.⁴³

7. However, the Senate removed the proposed amendment to s 93(8) from that Bill and it remains the case that only those persons serving a sentence of 5 years or longer (or who have been convicted of treason or treachery and have not been pardoned) cannot vote at federal elections.⁴⁴

The Bill

8. Currently, under s 21 of the *Parliamentary Electorates and Elections Act 1912* [the Act], a person is not entitled to have his or her name placed or retained on any electoral roll if the person:

- (a) is a temporary patient, a continued treatment patient, a protected person or an incapable person within the meaning of the *Mental Health Act 1958*, or a person under detention under Part 7 of that Act,
- (b) has been convicted of a crime or an offence, whether in New South Wales or elsewhere, and has been sentenced in respect of that crime or offence to imprisonment for 12 months or more and is in prison serving that sentence, or
- (c) is the holder of a temporary entry permit or is a prohibited immigrant under the *Migration Act 1958* (Cth).

⁴² Schedule 1, Item 10 of the *Electoral and Referendum Amendment Bill (No 2) 1998* (Cth). Other proposed amendments included the upgrading of witness provisions for electoral enrolment, a requirement for proof of identity for new enrolments, an earlier close of rolls and verification of citizenship [Senator Nick Minchin, Special Minister of State, *Government introduces legislation to improve the integrity and accuracy of the electoral roll*, Press Release, 14 May 1998].

⁴³ The Seventh Report of 1998 of the Senate Standing Committee for Scrutiny of Bills sets out the history of the proposed amendment and issues for consideration.
www.aph.gov.au/senate/committee/scrutiny/bills98/b07.htm.

⁴⁴ On the right to vote at federal elections generally, see A Twomey, "The Federal constitutional right to vote in Australia", *Federal Law Review*, 28(1), 2000 at 125.

9. The current exclusion under s 21(b) of the Act does *not* apply to persons:
- serving sentences of less than 12 months;
 - on parole;
 - performing community service orders;
 - serving sentences by way of home detention or periodic detention; or
 - on a good behaviour bond.
10. The Bill omits s 21(b) and substitutes proposed s 21(b) in the following terms:
- (b) has been convicted of an offence, whether in New South Wales or elsewhere, and is:
- (i) serving a sentence of imprisonment for that offence, whether by way of full-time detention, periodic detention or home detention, or
 - (ii) on remand pending sentencing for that offence, or
 - (iii) subject to a parole order or community service order in relation to that offence [Sch 1].
11. As at 29 June 2003, there were 3,502 persons on parole, 10,264 on probation, 4,632 subject to community service orders, 229 on home detention and 811 on periodic detention.⁴⁵

Issues Considered by the Committee

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

Issue Disqualification from voting: Schedule 1

12. Section 20 of the *Parliamentary Electorates and Elections Act 1912* [the Act] currently provides that, subject to s 21 and s 32–s 41⁴⁶, all persons:
- (a) who have attained 18 years of age, and
 - (b) who are:
 - (i) Australian citizens, or
 - (ii) persons (other than Australian citizens) who would, if the relevant Commonwealth law had continued in force, be persons who have the status of a British subject and who were, immediately before 26 January 1984, enrolled as electors for the Assembly or enrolled in any other State or Territory of the Commonwealth as electors for the House of Representatives,
- shall be entitled to enrolment.⁴⁷

⁴⁵ NSW Department of Corrective Services, *2002-2003 Annual Report*, www.dcs.nsw.gov.au.

⁴⁶ Sections 32 to 41A, (ie, Division 4) of the *Parliamentary Electorates and Elections Act 1912* provide for the process of enrolment.

⁴⁷ Section 20(b)(ii) was introduced by the *Parliamentary Electorates and Elections (Amendment) Act 1982*. It was aimed at removing discrimination against persons of non-British origin, and arose from meetings between the respective Commonwealth and States Ministers responsible for Immigration: Mr P T Anderson MP, Minister for Police and Emergency Services, *NSW Parliamentary Debates (Hansard)*, Legislative Assembly, 30 September 1982.

13. Failing to vote, once enrolled, is an offence, for which the maximum penalty is 0.5 penalty units (currently \$55) [s 120F].

Criminal disenfranchisement at international law

14. International law sets out basic principles for electoral democracy, including the right of citizens to vote.

Under Article 25 of the International Covenant on Civil and Political Rights [ICCPR], every citizen has the right to vote:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

Article 2 of the ICCPR specifies that rights set out therein may not be subject to discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

15. The United Nations Human Rights Committee [UNHCR] reviews adherence to the ICCPR. It has affirmed that Art 25 “lies at the core of democratic government based on the consent of the people”.

16. The UNHCR’s General Comment on Art 25 notes that:

[i]n their reports, States parties should indicate and explain the legislative provisions which would deprive citizens of their right to vote. The grounds for such deprivation should be objective and reasonable. If conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence. Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote.⁴⁸

17. The UNHCR has consistently noted the incompatibility of criminal disenfranchisement laws with the provisions of Art 25.⁴⁹

18. In keeping with international law responsibilities, many jurisdictions do not limit the rights of convicted persons to vote.⁵⁰

⁴⁸ See [www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CCPR+General+comment+25.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CCPR+General+comment+25.En?OpenDocument).

⁴⁹ The UNHCR has expressed concerns at a wide range of States parties’ criminal disenfranchisement laws, eg, Senegal (Consideration of Report by Senegal to the Human Rights Committee, CCPR/C/37/Add.4, April 7, 1987); Luxembourg (Consideration of Report by Luxembourg to the Human Rights Committee, CCPR/C/79/Add.11, December 28, 1992, D (10)); and the United Kingdom, in respect of Hong Kong (Comments on United Kingdom of Great Britain and Northern Ireland (Hong Kong), U.N. Doc. CCPR/C/79/Add.57 (1995), para. 19).

⁵⁰ See John Howard Society of Alberta, *Inmate Voting Rights*, www.johnhoward.ab.ca/PUB/A4.htm. In Germany, eg, the law obliges prison authorities to *encourage* prisoners to assert their voting rights and to facilitate voting procedures. The only prisoners who may not vote are those convicted of electoral crimes, or crimes that

- 19. The Committee notes the view that persons convicted of a criminal offence have not respected the rights of their fellow citizens and should not retain the right to vote while serving a sentence.**
- 20. The Committee also notes that the right to vote is fundamental to the proper functioning of the democratic system.**
- 21. The Committee considers that the proposed amendment to s 21 of the *Parliamentary Electorates and Elections Act 1912* trespasses on the personal right to vote.**
- 22. The Committee refers to Parliament the question whether the proposed amendment unduly trespasses on this right.**

The Committee makes no further comment on this Bill.

undermine the democratic order, (eg treason), and whose court-imposed sentence expressly includes disenfranchisement: www.sentencingproject.org/pdfs/9080.pdf.

6. SNOWY MOUNTAINS CLOUD SEEDING TRIAL BILL 2004

Date Introduced:	17 March 2004
House Introduced:	Legislative Council
Minister Responsible:	The Hon Ian Macdonald MLC
Portfolio:	Agriculture and Fisheries

Purpose and Description

1. This Bill facilitates a trial cloud seeding research project by Snowy Hydro Limited to increase winter snowfall in a targeted area of the Snowy Mountains.

Background

2. In his second reading speech, the Minister stated that:

The purpose of the Bill is to introduce measures to allow Snowy Hydro Ltd to commence a cloud-seeding research project by winter 2004. The research project must be commenced this winter to secure benefits for all stakeholders.

... The aim of the Snowy Mountains research project is to increase snowfall from clouds passing over the Snowy Mountains and to assess the effectiveness and reliability of precipitation enhancement technology in the Snowy Mountains.

... Seeding will occur using ground-based generators. These generators will create a stream of rising hot air, which will carry very small amounts of silver iodide and an inert tracing agent [indium sesquioxide] into winter storm clouds. ... Relay signal facilities will allow remote control of the ground-based generators in order to minimise access to the sites. The expected average annual increase in snowfall will be approximately 10 per cent, which is within the existing range of natural variability. This increase in snowfall equates to an approximate 70 gigalitre increase in annual water yield in the Snowy Hydro Scheme.⁵¹

3. The second reading speech noted research indicating that:

snowfalls in the Snowy Mountains region have been decreasing on an average of 1 per cent per year for the past 50 years. That decline in snowfalls, if continued, may lead to the extinction, within 70 years, of between 15 to 40 of the 200 alpine plant species.⁵²

4. In the second reading speech, the Minister also noted potential outcomes of the research project:

The research project will provide the ability to partially offset the impacts of the forecasted worsening drought conditions for New South Wales irrigators in the Murray

⁵¹ The Hon Ian Macdonald MLC, Minister for Agriculture and Fisheries, Second Reading Speech, *Parliamentary Debates (Hansard)* Legislative Council, 17 March 2004.

⁵² The Hon Ian Macdonald MLC, Minister for Agriculture and Fisheries, Second Reading Speech, *Parliamentary Debates (Hansard)* Legislative Council, 17 March 2004.

and Murrumbidgee valleys. The Snowy Mountains region is currently seven years into a continuing severe drought—already the worst drought in that area for 20 years.

Snowy Hydro advises that, under the forecast continuing dry weather patterns, the scheme's water storages could drop to 36 per cent by 2007-08...

Additionally, the research project has the ability to potentially benefit other species and ecological communities in the Snowy alpine regions. In particular, species vulnerable to shallow or declining snow...

The research project will also provide environmental benefits by increasing the capability of Snowy Hydro to produce clean, renewable energy...

The increased snowfall from the research project will also benefit tourism operators and communities in the Snowy Mountains. Improved snow depth and the length of the ski season are both expected outcomes from the research project.⁵³

5. The Minister also referred to cloud-seeding operations that have been undertaken elsewhere, including Tasmania and the USA. In these places, cloud seeding has been conducted for forty years.⁵⁴

The Bill

6. The Bill authorises Snowy Hydro Ltd to carry out cloud seeding operations for a limited period of 6 years [clauses 4 and 5 respectively] and for research purposes only.
7. Clause 4 also authorise the process for cloud seeding, namely discharging a seeding agent (silver iodide) and carrying out certain land-based operations such as installing and maintaining facilities and entry onto public land for these purposes.
8. The Minister for Infrastructure and Planning and the Minister for the Environment may, by order made jointly, terminate or suspend the authorisation at any time if they are satisfied that:
 - (a) the cloud seeding operations are having or will have a significant adverse environmental impact;
 - (b) Snowy Hydro Limited has not complied with requirements imposed by on it to minimise any such environmental impact; or
 - (c) Snowy Hydro Limited has failed to provide information concerning the environmental impact of the cloud seeding operations requested by the Ministers [clause 6]
9. The Bill allows Snowy Hydro Ltd to carry out the cloud seeding research without having first to comply with, or seek permission under NSW legislation.

The Bill provides that the cloud seeding operation can be carried out despite any other Act or law, including the *Environmental and Planning Assessment Act 1979*, the *National Parks and Wildlife Act 1974*, the *Protection of the Environment Operations*

⁵³ The Hon Ian Macdonald MLC, Minister for Agriculture and Fisheries, Second Reading Speech, *Parliamentary Debates (Hansard)* Legislative Council, 17 March 2004.

⁵⁴ See Second Reading Speech, The Hon Ian Macdonald MLC, Minister for Agriculture and Fisheries, *Parliamentary Debates (Hansard)* Legislative Council, 17 March 2004.

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Act 1997, Threatened Species Conservation Act 1995 and the Fisheries Management Act 1994 [see clause 7].

According to the Minister, “the process for approval for the research project required under [NSW] environmental legislation will not allow the project to commence in winter 2004.”

For this reason, “special provisions legislation” is being introduced.⁵⁵

10. The Natural Resources Commission will supervise the operations and report on the environmental impact to the Minister for Infrastructure and Planning and the Minister for the Environment.

The Commission’s report is also to be made public [clause 8].

11. The Bill provides that compensation is *not payable* by or on behalf of the Crown arising directly or indirectly from any of the following:
- (a) the enactment of the Act;
 - (b) the carrying out of the authorised cloud seeding operations; and
 - (c) the exercise of, or failure to exercise, a function under the Bill by any person [clause 9].

Snowy Hydro Ltd is explicitly excluded from the definition of “Crown” under the Bill [clause9(2)].

12. Schedule 1 describes the target area for the cloud seeding program, which comprises much of the Snowy Mountains between Thredbo and Khancoban.

Issues Considered by the Committee

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

Issue: Clause 2 – Commencement by proclamation

13. The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it chooses after assent or not to commence the Act at all.

While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, it can give rise to an inappropriate delegation of legislative power.

14. The Committee is advised by Treasury that the Bill is to commence on proclamation to allow time for Snowy Hydro Ltd and the Department of Conservation and Environment to develop and agree to a framework for environmental monitoring and assessment of the cloud seeding program.

⁵⁵ The Hon Ian Macdonald MLC, Minister for Agriculture and Fisheries, Second Reading Speech, *Parliamentary Debates (Hansard)* Legislative Council, 17 March 2004.

An *environmental framework agreement* needs to be in place before the legislation, and the cloud seeding program, can commence.

The Committee is advised by Treasury that Snowy Hydro Ltd and the Department of Conservation and Environment have begun working towards such an agreement.

- 15. The Committee is of the view that the need to develop a framework environmental agreement before the legislation commences and Snowy Hydro Ltd begins cloud seeding is an appropriate reason to delay commencement of this Bill.**
- 16. The Committee also notes that as the project must commence this winter, it is likely that any delay in commencement will be short.**

The Committee makes no further comment on this Bill.

SECTION B: MINISTERIAL CORRESPONDENCE — BILLS PREVIOUSLY CONSIDERED

7. CATCHMENT MANAGEMENT AUTHORITIES BILL 2003; NATURAL RESOURCES COMMISSION BILL 2003 AND NATIVE VEGETATION BILL 2003

Date Introduced:	12 November 2003
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Craig Knowles MP
Portfolio:	Natural Resources

Background

1. The Committee reported on the *Natural Resources Commission Bill 2003*, the *Native Vegetation Bill 2003* and the *Catchment Management Authorities Bill 2003* in Legislation Review Digest No 6 of 2003.
2. The Committee wrote to the Minister for Natural Resources to seek his advice with respect to the following:
 - the reason why each of these cognate bills are to commence by proclamation, and the likely commencement date of the Acts;
 - why there are no requirements regarding the qualifications or attributes of persons who have power of entry conferred upon them for the purposes of the *Catchment Management Bill 2003*; and
 - why the matters referred to in clause 15 and 28 are to be prescribed by regulation and not within the *Native Title Bill 2003*, as they are central to the fair and effective operation of the ensuing Act.

Minister's Reply

3. In a letter dated 15 March 2004, the Minister advised the Committee:
 - that the power for “other persons” to enter land is s 36 of the *Catchment Management Act 2003* is for all relevant purposes the same as s 53(1) of the *Catchment Management Act 1989* and that the Department was unaware of any concerns about the operation of s 53(1) and therefore did not alter the replacement provisions in the *Catchment Management Act 1989*. The Minister further advised that there are two safeguards that exist in relation to this provision:
 - (i) anyone who enters lands pursuant to s 36 may only construct works on the land that are expressly authorised in the Catchment Management

Authority's annual implementation program, which must be approved by the Minister; and

- (ii) there are provisions for compensation for damages suffered in the exercise of these functions; and
 - that approval to clear native vegetation under the *Native Vegetation Act 2003* may take the form of either a development consent under Part 4 of the *Environmental Planning and Assessment Act 1979* or a property vegetation plan (PVP) and that the purposes of the regulation is to allow additional more specific matters to be prescribed as appropriate.
4. The Committee notes that all three Bills were all assented to on 11 December 2003, and the *Natural Resources Commission Act 2003* and the *Catchment Management Authorities Act 2003* were proclaimed on 23 January 2004.
 5. The *Native Vegetation Act 2003* has not been proclaimed as yet, and the Minister's office has advised the Committee that the reason for this is because the regulations to accompany the Act are still being prepared.
 6. The Minister's office has advised the Committee that the *Native Vegetation Act 2003* is anticipated to be proclaimed mid 2004.

Committee's Response

7. The Committee thanks the Minister for his response.

The Committee makes no further comment on this Bill.



PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

18 November 2003

File Ref: CP3762/LRC505

The Hon Craig Knowles MP
Minister for Natural Resources
Level 33 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister

**Natural Resources Commission Bill 2003 Native Vegetation Bill 2003
Catchment Management Authorities Bill 2003**

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bills. The Committee will be reporting its consideration of the Bills in its *Legislation Review Digest No 6 of 2003*.

The Committee notes that each of the cognate Acts is to commence by proclamation.

The Committee seeks your advice as to the reason for commencement by proclamation, and the likely commencement date of the Acts.

The Committee also notes that pursuant to clause 36 of the *Catchment Management Authorities Bill 2003*, a Catchment Management Authority may, by its employees and other persons, enter and inspect any land (other than a dwelling) for the purpose of exercising its functions, and there construct any work in its annual implementation program that it is authorised to construct on the land. There is no definition of "other persons" in the *Catchment Management Authority Bill 2003*.

The Committee notes that there is no limitation on the class of persons to whom this power can be conferred. In addition, there appears to be no formal instrument or procedure for conferring these powers on persons. Nor is there any requirement on such persons to produce identification.

The Committee seeks your advice as to why there are no requirements regarding the qualifications or attributes of persons who may have powers of entry conferred upon them for the purposes of the proposed *Catchment Management Authority Act 2003*.

Catchment Management Authorities Bill 2003; Natural Resources Commission Bill 2003 and Native
Vegetation Bill 2003

The Committee notes that clauses 15 and 28 provide for a range of matters which are central to the effective and fair operation of the ensuing *Native Vegetation Act 2003* to be prescribed by regulation.

The Committee seeks your explanation as to why the matters referred to in clauses 15 and 28 are not prescribed within the *Native Vegetation Bill 2003*.

Yours sincerely

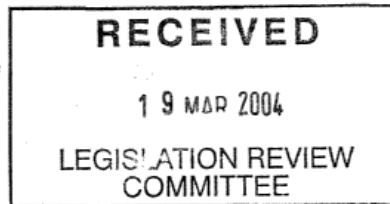


**BARRY COLLIER MP
CHAIRPERSON**



NEW SOUTH WALES
MINISTER FOR INFRASTRUCTURE AND PLANNING
MINISTER FOR NATURAL RESOURCES

Mr Barry Collier MP
Chairperson
Legislation Review Committee
Parliament of NSW
Macquarie Street
SYDNEY NSW 2000



D03/5730
CP3762/LRC505

15 MAR 2004

Dear Mr Collier

I refer to your letter concerning the Catchment Management Act 2003 (CMA Act) and the Native Vegetation Act 2003 (NV Act).

The Committee has inquired as to why section 36 of the *Catchment Management Authorities Act 2003* ("CMA Act") provides power to enter land and construct works to, in addition to employees of the CMA, an undefined and unlimited class of "other persons". Section 36(2) of the CMA Act is for all relevant purposes the same as section 53(1) of the *Catchment Management Act 1989*. The Department was not aware of any concerns about the operation of section 53(1) and accordingly did not alter the replacement provision in the CMA Act.

In addition to the history of this provision, two safeguards exist:

Anyone who enters lands pursuant to Section 36 may only construct works on the land that are expressly authorised in the CMA's annual implementation program ("AIP"). The CMA drafts the AIP, however, it has no effect until approved by the Minister responsible for the CMA Act.

There are provisions for compensation for damage suffered in the exercise of these functions.

The Committee has also inquired as to why the *Native Vegetation Act 2003* ("NV Act") allows criteria to guide the granting of either development consents or approvals to be prescribed by regulation. Approval to clear native vegetation under the NV Act may take the form of either a development consent under Part 4 of the *Environmental Planning and Assessment Act 1979* (EPA Act) or a property vegetation plan ("PVP").

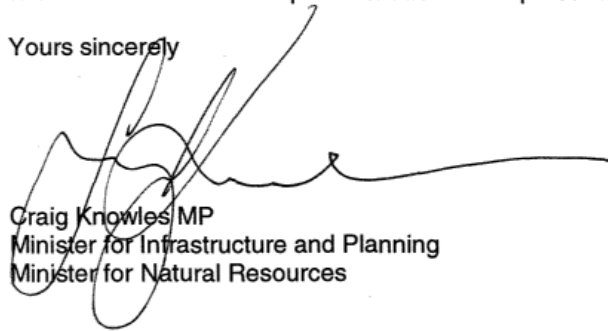
In the absence of a Regulation, criteria do exist to guide decision making as follows:

In relation to development consents, section 79C of the EPA Act specifies matters that must be taken into account when determining the application. In addition the NV Act requires the provisions of any catchment action plan (CAP) to be considered.

In relation to PVPs the relevant considerations depend on what is proposed in the PVP. If the PVP is merely identifying vegetation as regrowth evidence that the vegetation meets the definition of regrowth will be sufficient. If the PVP is for broadscale clearing some evidence of the impacts of the clearing may be required. The provisions of any CAP must also be considered.

In relation to both PVPs and development consents the purpose of the Regulation is to allow additional more specific matters to be prescribed if appropriate.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Craig Knowles', with a long horizontal flourish extending to the right.

Craig Knowles MP
Minister for Infrastructure and Planning
Minister for Natural Resources

8. ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (DEVELOPMENT CONSENTS) BILL 2003

Date Introduced: 17 October 2003
House Introduced: Legislative Assembly
Minister Responsible: The Hon Craig Knowles MP
Portfolio: Infrastructure and Planning

Background

1. The Committee reported on the *Environmental Planning and Assessment Amendment (Development Consents) Bill 2003* in Legislation Review Digest No 4 of 2003.
2. The Committee noted that the Bill was to commence on a day or days to be appointed by proclamation and wrote to the Minister for Infrastructure and Planning to seek his advice as to why it is necessary to commence this Bill on proclamation, and an indication of the likely timeframe within which this Act will be commenced.

Minister's Reply

3. In a letter dated 12 March 2004 (attached), the Minister advised the Committee that the commencement of the Act by proclamation was so that the Department of Infrastructure, Planning and Natural Resources could ensure the appropriate administrative systems were in place to deal with any applications as soon as the Act commenced.
4. The Minister further advised that the Act commenced by proclamation on 1 December 2003.

Committee's Response

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| 5. The Committee thanks the Minister for his reply. |
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The Committee makes no further comment on this Bill.

Environmental Planning And Assessment Amendment (Development Consents) Bill 2003



PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

24 October 2003

Our Ref: LRC457/CP3707

The Hon Craig Knowles MP
Minister for Infrastructure and Planning
Level 33 Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Minister

Environmental Planning and Assessment Amendment (Development Consents) Bill 2003

The Committee has considered this Bill under s 8A of the *Legislation Review Act 1987* and notes that it is to commence by proclamation.

The Committee is of the view that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it chooses after assent or not to commence the Act at all. While there may be good reasons why such discretion may be required, the Committee considers that, in some circumstances, it can give rise to an inappropriate delegation of legislative power.

We would appreciate it if you would advise us why it is necessary for this Bill to commence on proclamation, and indicate a time frame within which the Act will commence after assent.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Barry Collier', written over a large, stylized flourish.

Barry Collier MP
Chairperson



NEW SOUTH WALES
MINISTER FOR INFRASTRUCTURE AND PLANNING
MINISTER FOR NATURAL RESOURCES

Mr Barry Collier MP
Chairperson
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000



D03/5548

12 MAR 2004

Dear Mr Collier,

Thank you for your letter regarding the *Environmental Planning and Assessment Amendment (Development Consents) Act 2003*.

The *Environmental Planning and Assessment Amendment (Development Consents) Act 2003* was assented to on 6 November 2003 and commenced by proclamation on 1 December 2003.

Commencement of the Act was by proclamation so that the Department of Infrastructure, Planning and Natural Resources could ensure that appropriate administrative systems were in place to deal with any applications as soon as the Act commenced.

Enabling commencement by proclamation instead of fixing a set period after assent for commencement allows the Department to ensure that legislation does not commence on an inappropriate day in the middle of a week or during an inappropriate period such as January when people affected may be on holidays and unaware of the Act's implications for them.

I trust that this response alleviates the concerns raised in your letter.

Yours sincerely

Craig Knowles, MP
Minister for Infrastructure and Planning
Minister for Natural Resources

9. ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (PLANNING AGREEMENTS) BILL 2003

Date Introduced: 19 November 2003
House Introduced: Legislative Council
Minister Responsible: The Hon Craig Knowles MP
Portfolio: Infrastructure and Planning

Background

1. This Bill commences on proclamation.
2. The Committee considered the Bill at its meeting of 28 November 2003 and resolved to write to the Minister to seek his advice as to the reasons for commencement by proclamation and the likely timeframe within which the Act will commence.

Minister's Reply

3. The Committee received the Minister's reply on 19 March 2004.
4. The Minister advised that the Bill was drafted to commence on proclamation to allow the Department time to develop the regulatory component of the Scheme, including consulting with stakeholders.
5. He further advised that commencement on proclamation
allows the Department to ensure that the legislation does not commence on an inappropriate day in the middle of a week or during an inappropriate period such as January when people affected may be on holidays and unaware of the Act's implications for them.

Committee's Response

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| 6. The Committee thanks the Minister for his reply. |
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PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

28 November 2003

Our Ref:523
Your Ref:

The Hon Craig Knowles MP
Minister for Infrastructure and Planning
Level 33 Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Minister

**ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT
(PLANNING AGREEMENTS) BILL 2003**

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill. The Committee will be reporting its consideration of the Bill in its *Legislation Review Digest No 7 of 2003*.

The Committee notes that the Bill is to commence on a day or days to be proclaimed.

The Committee seeks your advice as to reasons for commencing the Bill on proclamation and an indication of a time frame within which the Act will commence.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Barry Collier', written over a large, stylized flourish.

**BARRY COLLIER MP
CHAIRPERSON**

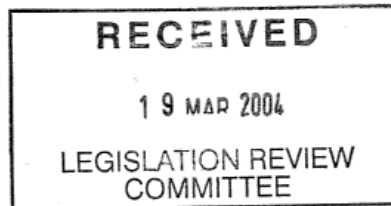
Environmental Planning and Assessment Amendment (Planning Agreements) Bill 2003



MINISTER FOR INFRASTRUCTURE AND PLANNING
MINISTER FOR NATURAL RESOURCES

D04/322

Mr Barry Collier MP
Chairperson
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000



12 MAR 2004

Dear Mr Collier,

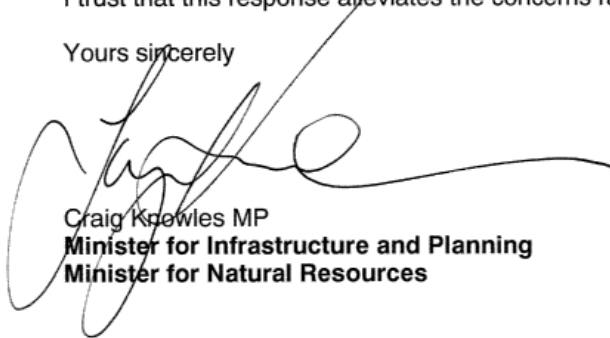
Thank you for your letter regarding the *Environmental Planning and Assessment Amendment (Planning Agreements) Bill 2003*.

The Bill was drafted to commence by proclamation so that the Department of Infrastructure, Planning and Natural Resources could develop, in consultation with stakeholders, the regulatory component of the Scheme. The flexibility provided by a proclaimed commencement will also allow time for local councils to prepare further for the introduction for the new system.

Enabling commencement by proclamation instead of fixing a set period after assent for commencement allows the Department to ensure that legislation does not commence on an inappropriate day in the middle of a week or during an inappropriate period such as January when people affected may be on holidays and unaware of the Act's implications for them. It also prevents the Bill commencing before detailed regulations or necessary administrative measures are in place to ensure the smooth operation of the amendment.

I trust that this response alleviates the concerns raised in your letter.

Yours sincerely



Craig Knowles MP
Minister for Infrastructure and Planning
Minister for Natural Resources

10. ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (QUALITY OF CONSTRUCTION) BILL 2003

Date Introduced:	14 November 2003
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Craig Knowles MP
Portfolio:	Infrastructure and Planning

Background

1. The Committee wrote to the Minister in relation to this Bill on 27 November 2003 and raised a number of concerns.
2. The Committee was concerned that a number of provisions apply retrospectively. Of particular concern to the Committee was the retrospective application of proposed subsection 109ZF(2), which allows complaints to be made against an accredited certifier where their accreditation has lapsed or is suspended.
3. The Committee also expressed concern that proposed section 118R may infringe a person's right to silence and undermine lawyer/client confidentiality by requiring a person so directed to give evidence or produce documents.
4. The Committee also sought the Minister's advice as to the reason for commencement by proclamation and the likely timeframe within which the Bill would commence.

Minister's Reply

Retrospectivity and clause 109ZF(2)

5. In his reply, which the Committee received on 15 March 2004, the Minister advised that without the amendment to subsection 109ZF(2)

it could have been open to a person to avoid disciplinary action being taken against them by allowing their accreditation to lapse. The amendment is designed to remove any doubt as to the operation of the existing legislation, and to ensure that the disciplinary regime for accredited certifiers cannot be avoided or undermined by persons allowing their accreditation to lapse.

Self-incrimination and clause 118R

6. In relation to the Committee's concerns with proposed section 118R, the Minister advised that this section is:

simply a restatement of the powers formerly available to department auditors through the former section 109U(2) of the [*Environmental Planning and Assessment Act 1979*]. This provision gives auditors the same powers as investigators under section

Environmental Planning And Assessment Amendment (Quality Of Construction) Bill 2003

431 of the *Local Government Act* . Section 118R now expressly provides for the auditors' powers without cross-referencing to [that Act].

In any disciplinary proceedings before the Administrative Decisions Tribunal arising out of any investigation relying on section 118R powers the accredited certifier has the protection against self-incrimination by virtue of section 73A of the *Administrative Decisions Tribunal Act 1997*.

Commencement by proclamation

7. The Minister advised that it was necessary for the Bill to commence on proclamation to allow time for the “publication of Departmental practice notes to assist stakeholders in understanding and implementing the new provisions before they commenced on 1 January and 1 March” 2004.

Committee's Response

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| 8. The Committee thanks the Minister for his reply. |
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PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

18 November 2003

Our Ref:513
Your Ref:

The Hon Craig Knowles MP
Minister for Infrastructure, Planning and Natural Resources
Level 33 Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Minister

**ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (QUALITY OF
CONSTRUCTION) BILL 2003**

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill. The Committee will be reporting its consideration of the Bill in its *Legislation Review Digest No 6 of 2003*.

The Committee resolved to write to you to seek your advice in relation to the following concerns with the Bill that the Committee has identified.

Retrospectivity

The Committee notes that a number of amendments in the Bill apply retrospectively. The Committee will always be concerned with any retrospective effect of legislation that impacts adversely on personal rights.

Of particular concern to the Committee is the retrospective application of the new subsection 109ZF(2) [Schedule 1, clause 2] that allows complaints to be made against an accredited certifier where their accreditation has lapsed or is suspended. The Committee is of the view that this has the effect of retrospectively changing the disciplinary regime in relation to certifying authorities or principal certifying authorities whose accreditation has lapsed.

The Committee seeks your advice as to the reason for the retrospective application of this provision and for a further explanation as to its full implications.

Right to silence and professional confidentiality

The Committee notes that new section 118R [clause 37] requires a person directed to give evidence or produce documents must comply with that direction.

The Committee is concerned that requiring a person directed to give evidence or produce documents to comply with that direction may infringe the person's fundamental right not to be forced to incriminate themselves.

In addition, the Committee is concerned that the provision may undermine the important principle of confidentiality of communications between a lawyer and her client, a key feature of our justice system.

In light of these concerns, the Committee seeks your advice as to the intended scope of this provision and, in particular, whether it is intended to remove a person's right to silence or to compel a person to breach a privileged communication.

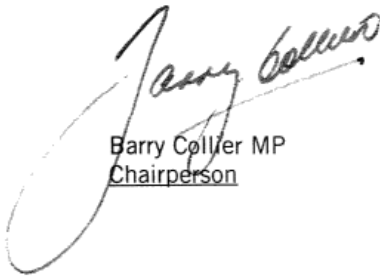
Commencement by proclamation

The Committee notes that most of the provisions in the proposed Act commence on a day or days to be appointed by proclamation.

The Committee seeks your advice as to the reason for commencement of these provisions by proclamation and their likely commencement date.

The Committee looks forward to your response to the three concerns raised in this letter.

Yours sincerely



Barry Collier MP
Chairperson

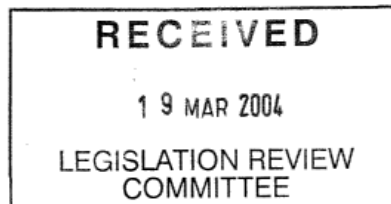


NEW SOUTH WALES

MINISTER FOR INFRASTRUCTURE AND PLANNING
MINISTER FOR NATURAL RESOURCES

2 MAR 2004

Mr Barry Collier
Legislation Review Committee
Parliament of NSW
Macquarie Street
Sydney NSW 2000



Dear Mr Collier,

Thank you for your letter received 27 November 2003 about the *Environmental Planning & Assessment Amendment (Quality of Construction) Act 2003* (the QOC Act).

Section 109ZF(2) was amended by the QOC Act to make it clear that references to 'accredited certifier' in Part 4B Division 3 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) include persons whose accreditation has lapsed as well as persons whose accreditation has been withdrawn or suspended.

Without this amendment, it could have been open to a person to avoid disciplinary action being taken against them by allowing their accreditation to lapse. The amendment is designed to remove any doubt as to the operation of the existing legislation, and to ensure that the disciplinary regime for accredited certifiers cannot be avoided or undermined by persons allowing their accreditation to lapse.

The amendment is necessary so that disciplinary proceedings cannot be avoided through an accredited certifier's person's reliance on the unintended gap in the existing legislative regime.

The new section 118R is simply a restatement of the powers formerly available to department auditors through the former section 109U(2) of the EP&A Act. This provision gives auditors the same powers as investigators under section 431 of the *Local Government Act* (the LG Act). Section 118R now expressly provides for the auditors' powers without cross-referencing the LG Act.

In any disciplinary proceedings before the Administrative Decisions Tribunal arising out of any investigation relying on section 118R powers the accredited certifier has the protection against self-incrimination by virtue of section 73A of the *Administrative Decisions Tribunal Act 1997*.

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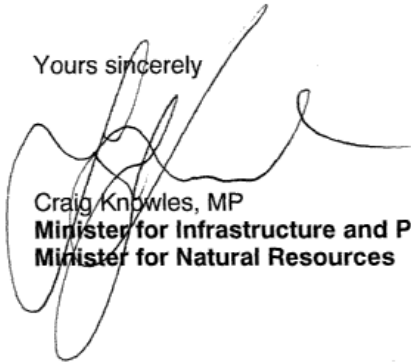
GPO Box 5341 Sydney NSW 2001 Telephone (02) 9228 4204 Facsimile (02) 9228 3718

Environmental Planning And Assessment Amendment (Quality Of Construction) Bill 2003

The QOC Act contains many procedural and technical provisions. The legislation's complexity and technical nature required that a period of time be allowed between assent and commencement for most provisions of the Bill. This enabled the publication of Departmental practice notes to assist stakeholders in understanding and implementing the new provisions, before they commenced on 1 January and 1 March 2003.

Please do not hesitate to contact Marcus Ray, of the Legal Service Branch of DIPNR on 9762-8283 if you wish to discuss these matters further.

Yours sincerely



Craig Knowles, MP
Minister for Infrastructure and Planning
Minister for Natural Resources

11. LEGAL PROFESSION LEGISLATION AMENDMENT (ADVERTISING) BILL 2003

Date Introduced: 2 December 2003
House Introduced: Legislative Council
Minister Responsible: The Hon Bob Debus MP
Portfolio: Attorney General

Background

1. The Committee reported on the *Legal Profession Legislation Amendment (Advertising) Bill 2003* in Legislation Review Digest No 1 of 2004.
2. The Committee noted that:
 - (i) the Bill did not provide for administrative review of a decision by the Minister to direct a person not to engage in specific conduct; and
 - (ii) under subsections 38JA (10) and s 142(6) of the *Legal Profession Act 1987*, and the *Workplace Management and Workers Compensation Act 1988* respectively, the Minister is not required to notify the person concerned before giving a direction that a person not engage in the prohibited conduct.
3. The Committee wrote to the Attorney General to seek his advice as to:
 - (i) why the Bill does not provide for the administrative review of a ministerial direction; and
 - (ii) why the legislation does not give a person adversely affected by a direction an opportunity to be heard.

Minister's Reply

4. In a letter dated 22 March 2004 (attached) the Attorney General advised the Committee that:
 - whilst the Act does not provide a statutory right of review of a Ministerial direction, common law principles of administrative law apply and the courts would be able to consider whether the relevant Minister acted within the allocated powers and according to law. Persons affected by a Ministerial direction could bring proceedings based on acting beyond power (*ultra vires*), jurisdictional error, error of law, or fraud; and
 - the reason for not requiring that a person be given an opportunity to be heard is that this could delay the making of a direction to such an extent that it is ineffective.

Committee's Response

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| 5. The Committee thanks the Attorney General for his reply. |
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The Committee makes no further comment on this Bill.



PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

13 February 2004

Our Ref: 535
Your Ref:

The Hon Bob Debus MP
Attorney General
Level 36, Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Attorney

Legal Profession Legislation Amendment (Advertising) Bill 2003

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill. The Committee will be reporting its consideration of the Bill in its *Legislation Review Digest No 1 of 2004*.

The Committee notes that this Bill was passed by both Houses on 3 December 2003. Under section 8A(2) of the *Legislation Review Act*, the Committee is not precluded from making a report on a Bill after it has passed a House of Parliament or become an Act.

The Committee resolved to seek clarification from you on two matters in relation to this Bill.

Firstly, the Committee notes that the legislation does not provide for administrative review of a Ministerial direction not to engage in prohibited conduct made under section 38JA of the *Legal Profession Act 1987* or section 142 of the *Workplace Management and Workers Compensation Act 1988*.

The Committee is of the view that an exercise of Ministerial discretion should ordinarily be reviewable to avoid making a person's rights, liberties or obligations unduly dependent on non-reviewable decisions.

The Committee would appreciate further explanation as to the reasons why the legislation does not provide for administrative review of a direction by the Minister.

Secondly, under subsections 38JA (10) and 142(6) of the *Legal Profession Act 1987* and *Workplace Management and Workers Compensation Act 1988* respectively, the Minister is not required to notify the persons concerned before giving a direction that a person not engage in the prohibited conduct.

The Committee understands that the right to be heard is a key rule of procedural fairness, which generally requires a decision-maker to give persons who may be adversely affected by the decision the opportunity to give their side of the story before a decision is made.

The Committee is of the view that the right to be heard is a very important principle that serves to protect individual rights and liberties.

However, the Committee also recognises that the extent to which a person is entitled to procedural fairness, and the right to be heard, will depend on the circumstances of the case. The Committee also notes that providing for administrative review of a decision may ameliorate the effect of failing to provide an opportunity to be heard in some cases.

The Committee would appreciate further explanation as to the reasons why the legislation does not give a person adversely affected by a direction an opportunity to be heard.

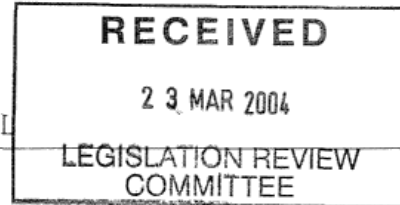
Yours sincerely

A handwritten signature in black ink, appearing to read 'Barry Collier', is written over a large, light-colored oval shape.

BARRY COLLIER MP
CHAIRPERSON



ATTORNEY GENERAL



Mr Barry Collier MP
Chairperson
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

03/6746

Your ref: 535

22 MAR 2004

Dear Mr Collier

I refer to your letter of 13 February 2004 concerning the *Legal Profession Legislation Amendment (Advertising) Bill 2003*.

Administrative Review of a Ministerial direction

The Committee notes that the legislation does not provide for administrative review of a Ministerial direction made under section 38JA of the *Legal Profession Act 1987* or section 142 of the *Workplace Management and Workers Compensation Act 1988*. These are directions that a person not engage in specified conduct that contravenes regulations made under the sections. The regulations may only prohibit conduct relating to the marketing of legal services or services to be provided by a workers compensation agent.

While the Acts do not provide a statutory right of review of a Ministerial direction, common law principles of administrative law apply and the courts would be able to consider whether the relevant Minister acted within the allotted powers and according to law. Persons affected by a Ministerial direction could bring proceedings based on acting beyond power (*ultra vires*), jurisdictional error, error of law or fraud.

Bearing in mind:

- the nature of the affected right and that the relevant Minister may only direct a person not to engage in conduct relating to the marketing of legal services, or agent services, that contravenes regulations;
- the costs of providing a statutory right of review by a Tribunal or the Courts; and
- that affected persons have recourse to administrative law remedies;

the Government is of the view that it is appropriate not to provide a statutory right of review to directions made under these sections.

Notifying persons concerned

The Committee notes that under subsections 38JA(10) and 142(6) of the *Legal Profession Act 1987* and *Workplace Management and Workers Compensation Act 1988*, the relevant Minister is not required to notify the persons concerned before giving a direction that a person not engage in the prohibited conduct.

The reason for not requiring that a person be given an opportunity to be heard is that this could delay the making of the direction to such an extent that it is ineffective.

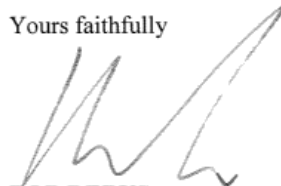
One of the reasons the *Legal Profession Legislation Amendment (Advertising) Act 2003* was introduced was that lawyers were advertising in breach of regulations made under the Acts but disciplinary or other proceedings relating to the breach took time, and in the meantime the advertisements might continue to be published. It was considered necessary to introduce a timely procedure that could halt the further publication of advertisements in breach of the regulations. Requiring that a person adversely affected by a direction be given an opportunity to be heard before making a direction could defeat this objective.

Bearing in mind:

- the nature of the affected right; and
- the need for a timely procedure that can halt the further publication of advertisements in breach of the regulations;

the Government is of the view that it is appropriate not to require that persons adversely affected by a direction be given an opportunity to be heard. This will, of course, not prevent affected persons being notified and given an opportunity to be heard in circumstances where there is no need for an immediate direction to prevent continued breaches of the regulations.

Yours faithfully



BOB DEBUS

12. PARTNERSHIP AMENDMENT (VENTURE CAPITAL FUNDS) BILL 2004

Date Introduced:	27 February 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Attorney General

Background

1. The Committee reported on the *Partnership Amendment (Venture Capital Funds) Bill 2004* in Legislation Review Digest No 3 of 2004.
2. The Committee wrote to the Attorney General to seek his advice with respect to the following matters arising under the Bill:
 - whether a representation or admission made by a limited partner acting as an agent of a partnership is evidence against the firm;
 - the need for the procedural restriction in the proposed s 53C(6) of the Bill, which limits the right of third parties to bring proceedings against a limited partner, given the provisions elsewhere in the Bill protecting limited partners from liability, and s 53c's potential impact on the ability of third parties to bring proceedings;
 - the reasons for restricting a third party's right to recover compensation for loss directly caused by a limited partner's wrongful act or omission in circumstances where the third party had reasonable grounds for believing the limited partner was a general partner; and
 - why the Bill is to commence on proclamation, and an indication of the timeframe within which the Act will commence after assent.

Minister's Reply

3. In a letter received on 23 March 2004 (attached), the Attorney General advised the Committee as follows:

Admissions and representations by limited partners

Section 15(2) of the Bill is silent on whether a comment by a limited partner can be used as evidence against the firm, although normally, it is unlikely that it would be so. However, if the limited partner were acting as an agent of the partnership or the general partner, then comments made would be evidence. This is because the limited partner is not acting solely in the role of limited partner, but in the role of agent.

Restrictions on joining limited partners to proceedings against partnerships

The procedural restriction in s 53C(6) was included for the avoidance of doubt, to make clear that a limited partner does not have joint and several liability from the firm's losses.

The Attorney noted that the use of a 'reasonable grounds' test for a third party's belief is included in the legislation governing the partnerships in other jurisdictions, namely the *Partnership Act 1957* (Vic), and the *Uniform Limited Partnership Act* in Delaware (USA).

The Attorney further advises that this provision does not prevent an investor bringing an action against the partnership, and a separate action against the limited partner under s 67A(2) in the same proceedings. This section only prohibits a limited partner being sued along with the incorporated limited partnership *in circumstances arising solely out of the conduct of the incorporated limited partnership*.

Wrongful acts or omissions of limited partners

If a limited partner caused loss to a third party in circumstances where the third party knew the limited partner was so limited, then the third party could bring an action in negligence. If the limited partner held out that they were an agent of the firm, but no such relationship existed, then the limited partner would be principally liable. In other circumstances, the third party could sue the partnership, who could then sue the limited partner.

The Attorney Notes that a limited partner is "likened to a shareholder in a company or unit holder in a managed investment scheme.

Commencement

It was necessary to commence the Bill on proclamation as this Bill impacts on the Office of Fair Trading's partnership registration system.

The Bill is set to commence on 5 April 2004.

Committee's Response**4. The Committee thanks the Attorney for his reply**

The Committee makes no further comment on this Bill.



PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

5 March 2004

The Hon R J Debus MP
Attorney General
Level 36, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Attorney

Partnership Amendment (Venture Capital Funds) Bill 2004

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill. The Committee will be reporting its consideration of the Bill in its *Legislation Review Digest No 3 of 2004*.

Admissions and representations by limited partners

The Committee notes that proposed s 15(2) limits the use that can be made in evidence of admissions or representations by limited partners.

The Committee also notes that proposed s 53C allows for limited partners to be agents of a partnership by agreement. The status of representations and admissions made by limited partners as agents of the partnership is not clear to the Committee.

The Committee seeks your advice as to whether a representation or admission made by a limited partner acting as an agent of a partnership is evidence against the firm.

Restrictions on joining limited partners to proceedings against partnerships

The Committee also notes that proposed s 53C(6) limits the right of a third party to bring proceedings against a limited partner

The Committee seeks your advice as to why the procedural restriction in proposed s 53C(6) is needed, given the provisions elsewhere in the Bill protecting limited partners from liability, and that section's potential impact on the rights of third parties to bring proceedings.

Wrongful acts or omissions of limited partners

The Committee also notes that pursuant to proposed s 67A(2), a third party must prove that he or she had reasonable grounds for belief that a limited partner was a general partner in the partnership, in order to be compensated for loss *directly* caused by a *wrongful* act or omission of that limited partner.

As it is the limited partner's wrongdoing that causes the loss, rather than the belief of the third party, it is not clear to the Committee why grounds for the third party believing the limited partner was a general partner must be proved.

The Committee seeks your advice as to the reasons for restricting a third party's right to recover compensation for loss directly caused by a limited partner's wrongful act or omission to circumstances where the third party had reasonable grounds for believing the limited partner was a general partner.

Commencement

Finally, the Committee notes that this Act is to commence by proclamation. I would appreciate it if you would advise the Committee why it is necessary for this Bill to commence on proclamation and indicate a time frame within which the Act will commence after assent.

Yours sincerely



**BARRY COLLIER MP
CHAIRPERSON**



ATTORNEY GENERAL

The Hon Barry Collier MP
Legislation Review Committee
Parliament House
Macquarie Street
SYDNEY 2000



Dear Chairperson

Re: *Partnership Amendment (Venture Capital Funds) Bill 2004.*

Thank you for your recent letter outlining comments from the Legislation Review Committee on the above Bill. Please find below responses to each of the issues raised in your letter.

Admissions and representations by limited partners

Section 15(2) provides that a comment by a general partner is evidence against the firm, and section 53C allows a limited partner to be an agent of the general partner by agreement. The Committee has asked whether a representation or admission made by a limited partner acting as an agent of a partnership or of a general partner can be evidence against the firm.

Although section 53C allows an agency relationship to exist between a limited partner and another, this provision was included for trustee companies that hold the interest in the firm on trust. Given the capital requirements of starting an Incorporated Limited Partnership (\$20 million), limited partners are likely to be large superannuation funds and other institutional investors. I am advised that it is very unlikely that these bodies would agree to enter an agency relationship and potentially breach the safe harbour provisions.

Also, section 15(2) is silent on whether a comment by a limited partner can be used as evidence against the firm. It is likely that normally, a comment by a limited partner would not be evidence against the firm. However, if the limited partner was acting as an agent of the partnership or of the general partner, then comments made would be evidence against the firm. This is because they are not acting solely in the role of 'limited partner' but in the role of agent.

Restrictions on joining limited partners to proceedings against partnerships

Section 53C(6) states that a limited partner is not a proper party to any action against an incorporated limited partnership. This provision was included for the avoidance of doubt, to make clear that a limited partner does not have joint and several liability for the firm's losses.

A limited partner as an investor, agrees to invest an amount of capital into the partnership, and their liability is limited to the extent of this amount. Therefore, a limited partner is likened to a shareholder in a company or unit holder in a managed investment scheme. In both these examples, the investor is not sued for losses of the entity, and section 53C(6) provides similar protection for Incorporated Limited Partnerships.

It is also important to note that section 53C(6) does not stop an investor bringing an action against the partnership, and a separate action against the limited partner under section 67A(2) in the same proceedings. Section 53C(6) only prohibits a limited partner from being sued along with the incorporated limited partnership in circumstances arising solely out of the conduct of the incorporated limited partnership.

Wrongful acts or omissions of limited partners

Section 67A(2) imposes liability on a limited partner when they take part in the management of the firm. The provision states that where loss is caused to a third party as a direct result of an act or omission by the limited partner, and the third party had reasonable grounds for believing that the limited partner was in fact a general partner, then the limited partner is personally liable for loss caused.

The test of 'reasonable grounds' must be established when bringing an action against a limited partner. Under the Bill, only a general partner can bind the partnership. Therefore, for a third party to rely on an act or omission they must reasonably believe that the limited partner is a general partner. Section 67A(2) ensures there is equity between the rights of the limited partner and the third party, so that the limited partner is not bound in circumstances where the third party had no grounds for believing that the limited partner could bind the partnership.

Any third party approaching the firm would deal with the general partner, who is the manager of the firm. If a limited partner caused loss to a third party in circumstances where the third party knew that the limited partner was so limited, then the third party could bring an action in negligence. If the limited partner held out that they were an agent of the firm, but no such relationship existed, then the limited partner would be principally liable. In other circumstances, the third party could sue the partnership, who could then sue the limited partner.

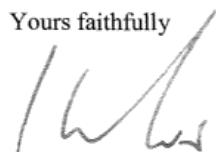
As section 67A(2) creates a statutory right to sue the limited partner, this right must be exercised only where the third party can establish that they had a reasonable belief in the act or omission of the general partner. The 'reasonable grounds' test is included for bringing actions against Limited Partners under the *Partnership Act 1957* (Vic), and the *Uniform Limited Partnership Act* in Delaware (US).

Commencement

As this Bill impacts on the Office of Fair Trading's partnership registration system, it is necessary to commence this Bill by proclamation. However, after discussions with the Office of Fair Trading the Bill is set to commence on 5 April 2004.

I trust that these comments answer your queries regarding the *Partnership Amendment (Venture Capital Funds) Bill 2004*.

Yours faithfully



BOB DEBUS

13. ROAD TRANSPORT LEGISLATION AMENDMENT (PUBLIC TRANSPORT LANES) BILL 2003

Date Introduced: 3 December 2003
House Introduced: Legislative Assembly
Minister Responsible: The Hon Carl Scully
Portfolio: Roads

Background

1. The Committee reported on the *Road Transport Legislation Amendment (Public Transport Lanes) Bill 2003* in Legislation Review Digest No 1 of 2004.
2. The Committee noted that this Bill would enable the RTA to set up cameras over public roads with the capacity to automatically identify and record passing vehicles. The Committee further noted that the RTA had in the past considered information recorded in analogous circumstances not to be personal information. The Committee therefore wrote to the Minister for Roads to seek clarification of the safe-keeping and availability of traffic lane camera device records.

Minister's Reply

3. In a letter dated 19 March 2004 (attached), the Parliamentary Secretary replied on behalf of the Minister, advising that:
 - under normal circumstances images recorded by traffic lane camera devices would not be available to the general public, however, such an image may be available in response to an application under the *Freedom of Information Act 1989*, unless the RTA was able to claim an exemption under the terms of that Act;
 - these images would be available from the RTA in association with any lawful purpose, such as in evidence for matters before a Court or pursuant to a warrant, subpoena or other Court order for its production; and
 - the safe keeping of images would be similar to that currently adopted by the RTA for the management of images recorded by a digital speed camera device.
4. The Parliamentary Secretary enclosed the management procedures adopted by the RTA for the safe keeping of these recorded images. This document is available from the Committee's website at www.parliament.nsw.gov.au/lrc/digests.

Committee's Response

5. **The Committee thanks the Minister for his reply**

The Committee makes no further comment on this Bill.



PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

13 February 2004

Our Ref:LRC537/3787

The Hon Carl Scully MP
Minister for Roads
Level 36
Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Minister

Road Transport Legislation Amendment (Public Transport Lanes) Bill 2003

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill. The Committee will be reporting its consideration of the Bill in its *Legislation Review Digest No 1 of 2004*.

The Committee notes that this Bill will enable the RTA to set up cameras over public roads with the capacity to automatically identify and record passing vehicles.

In the Bill's Second Reading speech it was suggested that a photographic record of a vehicle will only be stored if an offence has allegedly occurred. Nonetheless, once a photograph has been taken, it forms a record held by the RTA.

Privacy NSW has advised the Committee that on at least one occasion the RTA has released photographic records from a speed camera in response to a third party application under the *Freedom of Information Act 1989*. The Committee was advised that this is because the RTA does not consider such a record to be "personal information" within the meaning of s 4 of the *Privacy and Personal Information Protection Act 1998*.

The Committee is concerned that the availability of traffic lane camera photographs to third parties could trespass on personal rights to privacy.

The Committee seeks your clarification of the safe-keeping and availability of traffic lane camera device records.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Barry Collier', written over a horizontal line.

**BARRY COLLIER MP
CHAIRPERSON**

M04/1282




*Minister for Roads
Minister for Housing
Leader of the House*



Mr Barry Collier MP
Chairperson
Parliament of New South Wales
Legislation Review Committee
Parliament House
SYDNEY NSW 2000

19 MAR 2004


Dear Mr Collier

I refer to your letter to the Hon Carl Scully MP, Minister for Roads, concerning the safe keeping and availability of traffic lane camera device records. The Minister has asked me to reply on his behalf.

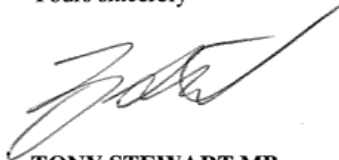
Under normal circumstances images recorded by a traffic lane camera device would not be available to the general public (i.e. a third party that is not the registered operator of the vehicle or the person identified as responsible for the vehicle at the time of the recorded offence). However, an image recorded by a traffic lane camera device might be available from the RTA in response to an application under the *Freedom of Information Act 1989* unless the RTA was able to claim an exemption under the terms of the Act.

Images recorded by a traffic lane camera device would be available for release by the RTA in association with any lawful purpose such as in evidence for matters before a Court or pursuant to any warrant, subpoena or other Court order for its production.

The safe keeping of images recorded by a traffic lane camera device would be similar to that currently adopted by the RTA for the management of images recorded by a digital speed camera device. Attached are details of the management procedures adopted by the RTA for the safe keeping of these recorded images.

I trust this information is of assistance.

Yours sincerely



TONY STEWART MP
Parliamentary Secretary for Roads

14. SUPERANNUATION ADMINISTRATION AMENDMENT BILL 2003

Date Introduced: 4 December 2003
House Introduced: Legislative Assembly
Minister Responsible: The Hon Michael Egan MLC
Portfolio: Treasurer

Background

1. The Committee reported on the *Superannuation Administration Amendment Bill 2003* in Legislation Review Digest No 1 of 2004.
2. The Committee noted that this Bill was to commence on proclamation, and therefore wrote to the Treasurer to seek his advice as to the reasons for commencement by proclamation and the likely commencement date of the Act.

Minister's Reply

3. In a letter dated 18 March 2004 (attached) the Treasurer advised the Committee that there is no intention to delay commencement, and that it is the Treasurers intention to commence the Act promptly after assent.

Committee's Response

4. **The Committee thanks the Treasurer for his reply.**

The Committee makes no further comment on this Bill.



PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

13 February 2003

Our Ref:LRC542/CP3790
Your Ref:

The Hon Michael Egan MLC
Treasurer
Level 33 Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Treasurer

SUPERANNUATION ADMINISTRATION AMENDMENT BILL 2003

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill. The Committee will be reporting its consideration of the Bill in its *Legislation Review Digest No 1 of 2004*.

The Committee notes that this Bill is to commence on a day or days to be appointed by proclamation. I would appreciate it if you would advise the Committee why it might be necessary to delay the commencement of the Bill and indicate a time frame within which the Act will commence after assent.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Barry Collier', written over a large, stylized flourish.

**BARRY COLLIER MP
CHAIRPERSON**



Treasurer of New South Wales
Australia

Mr Barry Collier MP
Member for Miranda
Chairperson
Legislation Review Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

Tim North
9228 4568
M72586

18 MAR 2004

Dear Mr Collier

Superannuation Administration Amendment Bill 2003

I refer to your letter of 13 February 2004 concerning the proposed date of commencement for the above Bill.

It is not unusual for Bills to be drafted to commence on proclamation. There is no intention to delay commencement and it is my intention that the Act will commence promptly after its assent.

I trust this addresses the Committee's concern.

Yours sincerely

A handwritten signature in black ink, appearing to read "Michael Egan".

Michael Egan
Treasurer

Part Two – Regulations

SECTION A: REGULATIONS ABOUT WHICH THE COMMITTEE IS SEEKING FURTHER INFORMATION

Regulation	Gazette reference		Information sought	Response Received
	Date	Page		
Inclosed Lands Protection Regulation 2002	06/12/02	10370	29/05/03 12/09/03	29/08/03 11/03/04
Road Transport (General) Amendment (Impounding Fee) Regulation 2003	17/10/03	10045	13/02/04	
Environmental Planning and Assessment Amendment (Certifier Accreditation) Regulation 2003	07/11/03	10369	05/03/04	

SECTION B: COPIES OF CORRESPONDENCE ON REGULATIONS

Regulation & Correspondence	Gazette ref
Regulatory Fees <ul style="list-style-type: none"><li data-bbox="140 338 798 371">• Letter to the Premier dated 24 October 2003<li data-bbox="140 371 762 405">• Letter from Premier dated 18 March 2004	N/A

1. Determination of fee increases



PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

24 October 2003

Our Ref: LRC453/CP3507

Your Ref:

The Hon Bob Carr MP
Premier
Level 40
Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Premier,

The Legislation Review Committee had recently considered a number of regulations implementing a series of annual regulatory fee increases, including 41 regulations increasing fees which were gazetted on 27 June 2003 and whose commencement was timed to coincide with the new financial year. In the majority of instances, these fees were increased by reference to either the retrospective or forecasted movement in the Consumer Price Index (CPI).

The Committee is concerned that routine fee increases in line with the CPI provide little incentive for agencies to keep their costs to a minimum. It also allows for increases regardless of whether the actual costs of providing the relevant services have increased. The Committee is particularly concerned with fee increases in line with forecast changes in the CPI, as this may set fees above what is purported to be the level required for cost recovery at the time the services are provided.

The Committee notes that a fee is properly a payment for a service and should not be in excess of the costs of providing that service.

In light of these concerns, the Committee has resolved to seek your advice as to the policies by which fee increases are set. It would also be grateful if you could provide information as to what mechanisms are in place to ensure that the costs of providing services are kept to a minimum and fees are not charged in excess of the cost of the service provided.

Thank you for your assistance.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Barry Collier', written over a large, stylized flourish.

Barry Collier MP
Chairperson
cc The Hon M Egan MLC

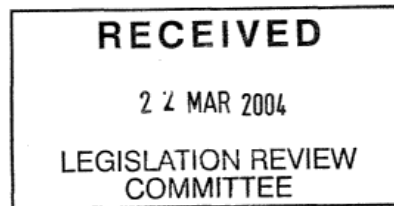
Parliament of New South Wales · Macquarie Street · Sydney NSW 2000 · Australia
Telephone (02) 9230 2899 · Facsimile (02) 9230 3052 · Email legislation.review@parliament.nsw.gov.au



Premier of New South Wales
Australia

18 MAR 2004

Mr Barry Collier MP
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000



Dear Mr Collier

I refer to your letter regarding annual regulatory fee increases that have recently been considered by the Legislation Review Committee (Ref. LRC453/CP3507). The delay in responding is regretted.

Considering the diversity of Government activities, it is not possible to prescribe a standard costing methodology to fit all circumstances. However, as a general principle, my Government expects that agencies' fees and charges should reflect the efficient costs of providing products and services.

The Committee is correct in asserting that using forecasts of the Consumer Price Index to adjust fees and charges can result in an over or under recovery of costs in a particular year. However, given that inflation is currently low and stable, the CPI is a reasonable indicator of many of the cost increases incurred by agencies.

Thank you for bringing the Committee's concerns to my attention.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Bob Carr'.

Bob Carr
Premier

Appendix 1: Index of Bills Reported on in 2004

	Digest Number
Animal Diseases Legislation Amendment (Civil Liability) Bill 2004	2
Appropriation (Budget Variations) Bill 2004	5
Botany Bay National Park (Helicopter Base Relocation) Bill 2004	5
Children (Detention Centres) Amendment Bill 2004	4
Civil Liability Amendment (Offender Damages) Bill 2004	5
Community Protection (Closure of Illegal Brothels) Bill 2003*	1
Crimes Legislation Amendment Bill 2004	3
Crimes (Sentencing Procedure) Amendment (Victims Impact Statements) Bill 2003	1
Cross-Border Commission Bill 2004	3
Education Amendment (Non-Government Schools Registration) Bill 2004	2
Electricity (Consumer Safety) Bill 2003	1,2
Fair Trading Amendment Bill 2004	4
Food Legislation Amendment Bill 2004	3
Freedom of Information Amendment (Terrorism and Criminal Intelligence) Bill 2004	2
Legal Profession Legislation Amendment (Advertising) Bill 2003	1
Local Government Amendment (Council and Employee Security) Bill 2004	5
National Competition Policy Amendment (Commonwealth Financial Penalties) Bill 2004	2
Occupational Health and Safety Amendment (Prosecutions) Bill 2003	1
Parliamentary Electorates and Elections Amendment (Prohibition on Voting by Criminals) Bill 2004*	5
Partnership Amendment (Venture Capital Funds) Bill 2004	3
Police Amendment (Crime Reduction and Reporting) Bill 2004	3
Prevention of Cruelty to Animals (Tail Docking) Bill 2004	4
Public Lotteries Legislation Amendment Bill 2004	2
Retirement Villages Amendment Bill 2004	3
Road Transport Legislation Amendment (Public Transport Lanes) Bill 2003	1
Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill 2003	1
Snowy Mountains Cloud Seeding Trial Bill 2004	5
Stock Diseases Amendment (False Information) Bill 2004	4
Strata Schemes Management Amendment Bill 2003	1,3
Superannuation Administration Amendment Bill 2003	1
The Synod of Eastern Australia Property Amendment Bill 2004	2

	Digest Number
Thoroughbred Racing Legislation Amendment Bill 2004	4
Wool, Hide and Skin Dealers Bill 2004	2

Appendix 2: Index of Ministerial Correspondence on Bills from September 2003

Bill	Minister/Member	Letter sent	Reply	Digests 2003	Digest 2004
Child Protection Legislation Amendment Bill 2003	Minister for Community Services	12/09/03	07/11/03	2,5	
Powers of Attorney Bill 2003	Attorney General	12/09/03	07/10/03	2,4	
Gaming Machines Amendment (Miscellaneous) Bill 2003	Minister for Gaming and Racing	10/10/03	26/11/03	3,7	
Environmental Planning and Assessment (Development Consents) Bill 2003	Minister for Infrastructure and Planning	24/10/03	19/03/04	4	5
Privacy and Personal Information Protection Amendment Bill 2003	Attorney General	24/10/03	25/02/04	4	3
Sydney Water Amendment (Water Restrictions) Bill 2003	Minister for Energy and Utilities	24/10/03	27/10/03	4,5	
Coroners Amendment Bill 2003	Attorney General	07/11/03	27/11/03	5,7	
Courts Legislation Amendment Bill 2003	Attorney General	07/11/03	25/11/03	5,7	
Independent Commission Against Corruption Amendment (Ethics Committee) Bill 2003	Premier	07/11/03	27/11/03	5,7	
Lord Howe Island Amendment Bill 2003	Minister for the Environment	07/11/03	28/11/03	5	1
National Parks and Wildlife Amendment (Kosciuszko National Park Roads) Bill 2003	Minister for the Environment	07/11/03	08/12/03	5	1
Transport Legislation Amendment (Safety and Reliability) Bill 2003	Minister for Transport Services	07/11/03	21/11/03	5,7	
Veterinary Practice Bill 2003	Minister for Agriculture and Fisheries	07/11/03	03/11/03	5	1
Catchment Management Authorities Bill 2003; Natural Resources Bill 2003 and Native Vegetation Bill 2003	Minister for Infrastructure, Planning and Natural Resources	18/11/03	19/03/04	6	5
Environmental Planning and Assessment (Quality of Construction) Bill 2003	Minister for Infrastructure, Planning and Natural Resources	18/11/03	19/03/04	6	5
Motor Accidents Legislation Amendment Bill 2003	Minister for Commerce	18/11/03	05/01/04	6	1
Police Legislation Amendment (Civil Liability) Bill 2003	Minister for Police	18/11/03	24/12/03	6	1
Transport Administration Amendment (Rail Agencies) Bill 2003	Minister for Transport Services	18/11/03		6	

Bill	Minister/Member	Letter sent	Reply	Digests 2003	Digest 2004
Workers Compensation Amendment (Insurance Reforms) Bill 2003	Minister for Commerce	18/11/03	05/01/04	6	1
Bail Amendment (Firearms and Property Offences) Bill 2003	Attorney General	28/11/03	12/01/04	7	1
Civil Liability Amendment Bill 2003	Minister for Health	28/11/03	22/12/03	7	1
Crimes Legislation Further Amendment Bill 2003	Attorney General	28/11/03	16/12/03	7	1
Environmental Planning and Assessment Amendment (Planning Agreements) Bill 2003	Minister for Infrastructure, Planning and Natural Resources	28/11/03	19/03/04	7	5
Local Government Amendment Bill 2003	Minister for Local Government	28/11/03		7	
Registered Clubs Amendment Bill 2003	Minister for Gaming and Racing	28/11/03	25/02/04	7	3
State Revenue Legislation Further Amendment Bill 2003	Treasurer	28/11/03	15/12/03	7	1
Electricity (Consumer Safety) Bill 2003	Minister for Fair Trading	13/02/04	18/02/04		1,2
Legal Profession Legislation Amendment (Advertising) Bill 2003	Attorney General	13/02/04	23/03/04		1,5
Road Transport Legislation Amendment (Public Transport Lanes) Bill 2003	Minister for Roads	13/02/04	23/03/04		1,5
Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill 2003	Minister for Roads	13/02/04			1
Strata Schemes Management Amendment Bill 2003	Minister for Fair Trading	13/02/04	27/02/04		1,3
Superannuation Administration Amendment Bill 2003	Treasurer	13/02/04	18/03/04		1,5
Partnership Amendment (Venture Capital Funds) Bill 2004	Attorney General	05/03/04	23/03/04		3,5
Prevention of Cruelty to Animals Amendment (Tail Docking) Bill 2004	Minister for Agriculture and Fisheries	16/03/04			4
Stock Diseases Amendment (False Information) Bill 2004	Minister for Agriculture and Fisheries	16/03/04			4
Thoroughbred Racing Legislation Amendment Bill 2004	Minister for Gaming Racing	16/03/04			4
Civil Liability Amendment (Offender Damages) Bill 2004	Minister for Justice	26/03/04			5

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2004

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Animal Diseases Legislation Amendment (Civil Liability) Bill 2004	N				
Botany Bay National Park (Helicopter Base Relocation) Bill 2004				N	
Civil Liability Amendment (Offender Damages) Bill 2004	R			C	
Community Protection (Closure of Illegal Brothels) Bill 2003	R				
Crimes (Sentencing Procedure) Amendment (Victims Impact Statements) Bill 2003				N	
Education Amendment (Non-Government Schools Registration) Bill 2004				N	
Electricity (Consumer Safety) Bill 2003	N,R				C
Fair Trading Amendment Bill 2004				N	
Food Legislation Amendment Bill 2004				N	
Freedom of Information Amendment (Terrorism and Criminal Intelligence) Bill 2004	N			N	
Legal Profession Legislation Amendment (Advertising) Bill 2003	C, R		C, R	N	
Local Government Amendment (Council and Employee Security) Bill 2004	N			N	
Occupational Health and Safety Amendment (Prosecutions) Bill 2003	N				
Parliamentary Electorates and Elections Amendment (Prohibition on Voting Rights by Criminals) Bill 2004*	R				
Partnership Amendment (Venture Capital Funds) Bill 2004	C			C	

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Prevention of Cruelty to Animals Amendment (Tail Docking) Bill 2004				C	
Public Lotteries Legislation Amendment Bill 2004				N	
Road Transport Legislation Amendment (Public Transport Lanes) Bill 2003	N,C				
Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill 2003				C	
Snowy Mountains Cloud Seeding Trial Bill 2004				N	
Stock Diseases Amendment (False Information) Bill 2004	C			C	
Strata Schemes Management Amendment Bill 2003				N,C	
Superannuation Administration Amendment Bill 2003	N			C	
Thoroughbred Racing Legislation Amendment Bill 2004				C	
Wool, Hide and Skin Dealers Bill 2004				N	

Key

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