

PARLIAMENT OF NEW SOUTH WALES



# **Legislation Review Committee**

## LEGISLATION REVIEW DIGEST

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No 9 of 2005

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12 September 2005

New South Wales Parliamentary Library cataloguing-in-publication data:

**New South Wales. Parliament. Legislative Assembly. Legislation Review Committee.**

Legislation Review Digest, Legislation Review Committee, Parliament NSW Legislative Assembly. [Sydney, NSW] : The Committee, 2005, 77p; 30cm

Chair: The Hon Peter Primrose MLC

12 September 2005

ISSN 1448-6954

1. Legislation Review Committee—New South Wales
2. Legislation Review Digest No 9 of 2005

I Title.

II Series: New South Wales. Parliament. Legislative Assembly. Legislation Review Committee Digest; no. 9 of 2005

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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.

## **GUIDE TO THE *LEGISLATION REVIEW DIGEST***

### **Part One – Bills**

#### **Section A: Comment on Bills**

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

#### **Section B: Ministerial correspondence – Bills previously considered**

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

### **Part Two – Regulations**

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

#### **Regulations for the special attention of Parliament**

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

#### **Regulations about which the Committee is seeking further information**

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

#### **Copies of Correspondence on Regulations**

This part of the *Digest* contains copies of the correspondence between the Committee and Ministers on Regulations about which the Committee sought information. The Committee’s letter to the Minister is published together with the Minister’s reply.

## **Appendix 1: Index of Bills Reported on in 2005**

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

## **Appendix 2: Index of Ministerial Correspondence on Bills for 2005**

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

## **Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2005**

This table specifies the action the Committee has taken with respect to Bills that received comment in 2005 against the five scrutiny criteria. When considering a Bill, the Committee may refer an issue that relates to its scrutiny criteria to Parliament, it may write to the Minister or Member of Parliament responsible for the Bill, or note an issue. Bills that did not raise any issues against the scrutiny criteria are not listed in this table.

## **Appendix 4: Index of correspondence on Regulations reported on in 2005**

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

## **SUMMARY OF CONCLUSIONS**

### **SECTION A: Comment on Bills**

#### **1. Building Legislation Amendment (Smoke Alarms) Bill 2005**

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

#### **2. Duties Amendment (Abolition Of Bob Carr's Vendor Duty) Bill 2005\***

- |   |
|---|
| 6. The Committee has not identified any issues under s 8A(1)(b) of the Legislation Review Act 1987. |
|---|

#### **3. James Hardie Former Subsidiaries (Special Provisions) Bill 2005**

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

#### **4. Legislation Review Amendment (Family Impact) Bill 2005\***

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

#### **5. Local Government and Valuation of Land Amendment (Water Rights) Bill 2005**

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

#### **6. National Parks and Wildlife (Further Adjustment of Areas) Bill 2005**

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

#### **7. Parliamentary Electorates And Elections Amendment (Voting Age) Bill 2005\***

**Disqualification from voting of persons under 18 years who are subject to 12 months of more of criminal detention: proposed s 21(b1)**

- |   |
|---|
| 13. The Committee notes that disentitling any citizens of voting age from the right to vote is a significant trespass to those persons' rights and should only be provided for when clearly justified in a free and democratic society. |
| 14. The Committee notes that, under current NSW law, persons serving a prison sentence of 12 months or more are not entitled to vote.   |



15. The Committee refers to Parliament the question of whether proposed cl 21(b1) of the Bill is an undue trespass on the right to freedom from discrimination and to equality before the law.

## **8. Security Industry Amendment Bill 2005**

### **Procedural fairness: new s 29(3)**

16. The Committee notes that it is a fundamental common law rule that a person must be given an opportunity to participate in the decisions that affect him or her.
17. The Committee also notes that the provisions of new s 29(3) trespass upon this right by providing that a person may not be made aware of important information to be relied upon in determining an appeal against the refusal to grant, or the revocation of, a licence.
18. The Committee notes that the provision does not limit the Administrative Decision Tribunal's access to material on which the decision under review was based while preventing release of the material to the person to whom the intelligence relates.
19. The Committee refers to Parliament whether new s 29(3) unreasonably trespasses on an applicant's right to a fair hearing.

### **Rostering or scheduling: new s 38C**

31. The Committee notes that new s 38C places a considerable onus of knowledge upon a person employed to roster or schedule licensees, and that there are severe penalties for failing to comply with the new section, including imprisonment.
32. The Committee notes the importance of protecting convicted persons who have completed their sentence from stigma and discrimination to allow them, as far as practicable, to participate fully in society and reduce the likelihood of their recidivism.
33. The Committee has written to the Minister expressing its concerns with respect to the potential for new s 38C to unduly trespass upon rights and liberties. In particular, the Committee has written to the Minister for:
- a) advice as to why the Bill does not provide any mechanism by which a person could be alerted to the fact that they are prohibited from certain forms of employment based on their past offences (eg, a licensing regime);
  - b) advice as to why the offence is a strict liability offence and why the Bill does not provide a defence, such as lack of knowledge;
  - c) clarification on the need to subject a person who has been found guilty but not convicted of an offence to the prohibition in section 38C;
  - d) advice on the public interest justifications behind the Bill potentially subjecting a person to a double punishment, especially a person who has not had a conviction recorded against them; and

- e) advice on the justification for the high penalty for this offence, including a term of imprisonment, especially given that there is no fault element for the offence and the offence applies to a person who has no recorded conviction.
36. The Committee considers that offences for which there is no fault element should not normally be punishable by imprisonment.
37. The Committee has written to the Minister to seek his advice as to the reasons for including imprisonment as a penalty for offences without a fault element in Schedule 1 [65].
44. The Committee notes that placing more than an evidential burden of proof has at times been held to unduly trespass upon the presumption of innocence, a fundamental human right recognised at common law and international law.
45. The Committee has written to the Minister for advice as to the reasons for placing a legal rather than an evidential burden on defendants under s 39.

**Attributing personal liability for corporate conduct and reversing onus of proof: new s 44**

58. The Committee notes that reversing the onus of proof is inconsistent with the fundamental right of a person to be presumed innocent and requires a balance to be struck between the general interest of the community and the protection of the fundamental rights of the individual. This will not be achieved if the reverse onus provision goes beyond what is necessary to accomplish the objective of the statute.
59. The Committee again notes that this balance can normally be achieved by placing no more than an evidential burden on the defendant.
60. The Committee also notes the important policy objectives of the Act to ensure the safety of the community in the course of the commercial provision of security services.
61. The Committee refers to the Parliament the question as to whether new s 44 unduly trespasses on personal rights and liberties.

**9. Smoke-Free Environment Amendment (Motor Vehicle Prohibition) Bill 2005\***

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

**SECTION B: Ministerial Correspondence — Bills Previously Considered**

**10. Building Professionals Bill 2005**

6. The Committee thanks the Minister for her reply.

**11. Criminal Procedure Further Amendment (Evidence) Bill 2005**

4. The Committee thanks the Attorney General for his reply.

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**12. Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005**

8. The Committee thanks the Minister for his reply.

**13. Local Government Amendment Bill 2005**

7. The Committee thanks the Minister for his reply.

**14. Photo Card Bill 2005**

4. The Committee thanks the Minister for his reply.



## Part One – Bills

### SECTION A: COMMENT ON BILLS

# 1. BUILDING LEGISLATION AMENDMENT (SMOKE ALARMS) BILL 2005

|                       |                         |
|-----------------------|-------------------------|
| Date Introduced:      | 21 June 2005            |
| House Introduced:     | Legislative Assembly    |
| Minister Responsible: | The Hon Frank Sartor MP |
| Portfolio:            | Planning                |

The Bill passed all stages in the Legislative Assembly on 21 June 2005 and in the Legislative Council on 23 June 2005. It received Royal Assent on 1 July 2005. Under s 8A(2), the Committee is not precluded from reporting on a Bill because it has passed a House of the Parliament or become an Act.

### Issues Considered by the Committee

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

*The Committee makes no further comment on this Bill.*

## 2. DUTIES AMENDMENT (ABOLITION OF BOB CARR'S VENDOR DUTY) BILL 2005\*

Date Introduced: 23 June 2005  
House Introduced: Legislative Assembly  
Member Responsible: Mr John G Brogden MP

### Purpose and Description

1. This Bill amends the *Duties Act 1997* (Act) to abolish vendor duty, and duty on the disposal of interests in land rich landholders, from 1 July 2005.

### The Bill

2. The Bill abolishes vendor duty, being duty charged on certain dutiable transactions in respect of land-related property,<sup>1</sup> in respect of any such transaction that occurs on or after 1 July 2005 [proposed new s 144A(1) and (2)].
3. The Bill also makes inapplicable provisions in the Act relating to the stamping of transactions for which vendor duty is not currently charged (s 162ZC) and the registration of dutiable transactions (s 301(2)) [proposed new s 144A(3)].
4. The Bill also abolishes duty on any disposal of an interest in land rich landholders that is made on or after 1 July 2005 [proposed new s 163AA].<sup>2</sup>
5. The Bill commences, or is taken to have commenced, on 1 July 2005 [proposed s 2].

### Issues Considered by the Committee

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

*The Committee makes no further comment on this Bill.*

<sup>1</sup> See *Duties Act 1997*, s 145.

<sup>2</sup> Section 163A(1) of the *Duties Act 1997* defines a **landholder** as a private unit trust scheme, a wholesale unit trust scheme or a private company, terms which are further defined in the Act's dictionary. For the purposes of the Act, a landholder is **land rich** if it has land holdings in NSW with an unencumbered value of \$2,000,000 or more, and its land holdings in all places, whether within or outside Australia, comprise 60% or more of the unencumbered value of all its property: *Duties Act 1997*, s 163B(1).

### **3. JAMES HARDIE FORMER SUBSIDIARIES (SPECIAL PROVISIONS) BILL 2005**

Date Introduced: 21 June 2005  
House Introduced: Legislative Assembly  
Minister Responsible: The Hon Bob Debus MP  
Portfolio: Attorney General

This Bill passed all stages in the Legislative Assembly on 21 June 2005 and in the Legislative Council on 22 June 2005. It received Royal Assent on 23 June 2005. Under s 8A(2), the Committee is not precluded from reporting on a Bill because it has passed a House of the Parliament or become an Act.

#### **Issues Considered by the Committee**

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

*The Committee makes no further comment on this Bill.*

## 4. LEGISLATION REVIEW AMENDMENT (FAMILY IMPACT) BILL 2005\*

Date Introduced: 21 June 2005  
House Introduced: Legislative Council  
Member Responsible: The Hon Patricia Forsythe MLC

### Purpose and Description

1. The object of the Bill is to amend the *Legislation Review Act 1987* (the Act) to extend the role of the Legislation Review Committee to include the scrutiny of the impact of bills and regulations on families.

### Background

2. The second reading speech states that:

It is an undeniable fact that some Government actions impact positively and some impact negatively on families, and that both should receive similar consideration by the Legislation Review Committee. The House should keep that in mind when it is considering legislation and regulations.<sup>3</sup>

### The Bill

3. The Bill amends the Act to extend the role of the Legislation Review Committee to require it:
  - (a) to consider whether bills introduced into Parliament impact on families and to report to both Houses of Parliament accordingly [proposed s 8A(1)(c)]; and
  - (b) to consider whether Parliament's special attention should be drawn to regulations on the ground that they impact on families and to make such reports and recommendations as it considers desirable to both Houses of Parliament as a result of that consideration [proposed s 9(1)(b)(iia)].

### Issues Considered by the Committee

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

*The Committee makes no further comment on this Bill.*

<sup>3</sup> The Hon Patricia Forsythe MLC, Legislative Council *Hansard*, 21 June 2005.



## 5. LOCAL GOVERNMENT AND VALUATION OF LAND AMENDMENT (WATER RIGHTS) BILL 2005

|                       |                         |
|-----------------------|-------------------------|
| Date Introduced:      | 21 June 2005            |
| House Introduced:     | Legislative Assembly    |
| Minister Responsible: | The Hon Kerry Hickey MP |
| Portfolio:            | Local Government        |

The Bill passed all stages in the Legislative Assembly on 21 June 2005 and in the Legislative Council on 22 June 2005. It received Royal Assent on 27 June 2005. Under s 8A(2), the Committee is not precluded from reporting on a Bill because it has passed a House of the Parliament or become an Act.

### Issues Considered by the Committee

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

*The Committee makes no further comment on this Bill.*

## **6. NATIONAL PARKS AND WILDLIFE (FURTHER ADJUSTMENT OF AREAS) BILL 2005**

Date Introduced: 21 June 2005  
House Introduced: Legislative Assembly  
Minister Responsible: The Hon Bob Debus MP  
Portfolio: Environment

This Bill passed all stages in the Legislative Assembly on 21 June 2005 and in the Legislative Council on 23 June 2005. The Bill received Royal Assent on 1 July 2005. Under s 8A(2), the Committee is not precluded from reporting on a Bill because it has passed a House of the Parliament or become an Act.

### **Issues Considered by the Committee**

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

*The Committee makes no further comment on this Bill.*

## 7. PARLIAMENTARY ELECTORATES AND ELECTIONS AMENDMENT (VOTING AGE) BILL 2005\*

Date Introduced: 21 June 2005  
House Introduced: Legislative Council  
Member Responsible: The Hon Ian Cohen MLC

### Purpose and Description

1. The Bill amends the *Parliamentary Electorates and Elections Act 1912* (the Act) so as to reduce the minimum voting age from 18 to 16 in State elections and local government elections.

### Background

2. The second reading speech states:

The bill will qualify 16-year-olds to vote in parliamentary elections. However, voting for 16-year-olds and 17-year-olds is not to be compulsory. Whereas at present provisional enrolment of persons can occur at the age of 17 years, the bill will provide for the provisional enrolment of persons from 15 years of age. The bill will not confer a right or privilege other than the entitlement to vote at an election, impose an obligation or liability or qualify a person to hold a position or exercise a power upon persons under 18 years of age.<sup>4</sup>

### The Bill

3. The Bill:
  - (a) reduces the age from which a person becomes entitled to enrol (and therefore to vote) from 18 years to 16 years [amended s 20];
  - (b) disqualifies a person who is the subject of a detention order under the *Children (Criminal Proceedings) Act 1987* from voting if the order has a term of twelve months or more [amended s 21];
  - (c) allows the provisional enrolment of persons from 15 years of age [amended s 33A];
  - (d) provides, in effect, that a person between 16 and 18 years who chooses not to vote does not commit offences relating to a failure to vote [amended s 34, s 120C and s 120F]; and
  - (e) clarifies that the lowering of the voting age from 18 years to 16 years does not:
    - entitle an elector under 18 years of age to serve on a jury; or

<sup>4</sup> The Hon Ian Cohen MLC, Legislative Council *Hansard*, 21 June 2005.

Parliamentary Electorates And Elections Amendment (Voting Age) Bill 2005\*

- grant any other rights, entitlements or privileges to a person under age 18 years of age simply because the person is entitled to vote or to be enrolled for voting, whether those rights, entitlements or privileges arise under the Act, or under any other Act or law unless any contrary intention appears in that Act or law [proposed new s 187].
4. The Bill clarifies that a person under 18 years of age is not disqualified from voting in an election conducted under Chapter 10 of the *Local Government Act 1993* [proposed new s 187(5)].<sup>5</sup> The effect of proposed s 187(5) of the Bill is to ensure that the reduction in voting age for State elections flows through to local government elections.<sup>6</sup>
  5. The Bill is to commence on the date of assent [cl 2]. However, a transitional provision suspends the entitlement to vote that is conferred by the ensuing Act in relation to any election that occurs within 12 months after the date of assent [cl 4].

## Issues Considered by the Committee

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

#### Disqualification from voting of persons under 18 years who are subject to 12 months or more of criminal detention: proposed s 21(b1)

6. The Bill generally entitles persons who are between 16 and 18 years of age to vote in State and local government elections. However, it specifically disentitles persons who are within that age group and who are the subject of a detention order with a term of 12 months or more under the *Children (Criminal Proceedings) Act 1987* from enrolling to vote and voting.
7. There is not any objective standard regarding the minimum age at which the right to vote should be enjoyed.<sup>7</sup> However, if the Parliament extends that right to persons who

---

<sup>5</sup> Chapter 10 of the *Local Government Act 1993* deals with the election of persons to civil office, including councillors and mayors elected by vote.

<sup>6</sup> By virtue of s 266 of the *Local Government Act 1993*, a person who is qualified to vote in a State election is also qualified to vote in a local government election.

<sup>7</sup> The Australian Constitution and the NSW Constitution do not contain an express guarantee of universal suffrage [Department of Parliamentary Services, *Inside outcasts: prisoners and the right to vote in Australia*, Current Issues Brief No. 12 2003-04, 24 May 2004, 7]. Furthermore, international law does not explicitly recognise a right of persons under 18 years of age to vote. Article 25(b) of the International Covenant on Civil and Political Rights relevantly provides that “every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 [distinctions based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*] and without unreasonable restrictions... to vote”. Article 25(b) does not exclude children from its terms, however, the UN Committee on Human Rights has commented that:

The right to vote at elections and referenda must be established by law and may be subject only to reasonable restrictions, such as setting a minimum age limit for the right to vote: *General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25)*, CCPR/C/21/Rev.1/Add.7, 12 July 1996, paragraph 10.

However, provisions in the Convention on the Rights of the Child have been relied upon to support the policy position that the voting age should be lowered. In particular, Article 12(1) of the Convention on the Rights of the Child requires that “State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the view of the child being given due

## Parliamentary Electorates And Elections Amendment (Voting Age) Bill 2005\*

are at least 16 years of age, any subsequent denial of that right to particular persons needs to be justified and proportionate.

8. Article 26 of the International Covenant on Civil and Political Rights requires that all people be equal before the law and be entitled, without discrimination based on “any other status”, to the equal protection of the law.<sup>8</sup> The Committee notes that there are arguments that, in some circumstances, a person’s criminal status should prevent that person from voting, and that current NSW law prevents adults serving a prison sentence of 12 months or longer from voting. However, any such denial of the right to vote needs to be clearly justified as appropriate for a free and democratic society.
9. In this regard, the Committee notes certain judicial decisions from jurisdictions that have an entrenched right to vote.
10. The Supreme Court of Canada found a provision in the Canadian *Elections Act 1985*, which denied the right to vote to every person serving a sentence of two years or more, unconstitutional on the basis that it was so widely drawn as to infringe article 1 (Charter rights and freedoms subject “only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society) and article 3 (the right of every citizen to vote) of the Canadian Charter of Rights and Freedoms.<sup>9</sup>
11. A Chamber of the European Court of Human Rights has held that the United Kingdom breached Article 3 of Protocol No. 1 to the European Convention on Human Rights<sup>10</sup> by its blanket ban on prisoner voting rights.<sup>11</sup> This decision has been appealed by the United Kingdom to the Grand Chamber of the European Court of Human Rights.<sup>12</sup>
12. The UN Committee on Human Rights has consistently noted the incompatibility of certain criminal disenfranchisement laws with international human rights standards, including the principle of non-discrimination.<sup>13</sup> The UN Committee on Human Rights has commented that:

In their reports, State Parties should indicate and explain the legislative provisions which would deprive citizens of their right to vote. The grounds for such deprivation

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weight in accordance with the age and maturity of the child”. Article 1 of that Convention defines a child as meaning “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”. See, for example, Robert Ludbrook, ‘Children and the political process’ in Melinda Jones and Lee Ann Bassar Marks, *Children on the agenda – the rights of Australian children*, (Prospect, St Leonards, 2001), and Brian Simpson, ‘Give children the vote!’ (1993) 18(4) *Alternative Law Journal* 190.

<sup>8</sup> Article 2 and Article 26 of the ICCPR do not specifically mention “criminal record” or “criminal convictions” as a ground for discrimination. However, in Australia, the Human Rights and Equal Opportunity Commission recognises that it may be the basis for a discrimination complaint in certain spheres of activity.

<sup>9</sup> *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519. All prisoners in Canada are currently entitled to vote.

<sup>10</sup> Article 3 of the First Protocol to the European Convention of Human Rights states: “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”.

<sup>11</sup> *Hirst v The United Kingdom (No. 2)*, Application no. 74025/01, 30 March 2004.

<sup>12</sup> The appeal was heard on 27 April 2005 and judgment has been reserved.

<sup>13</sup> See, for example, Senegal (Consideration of Report by Senegal to the Human Rights committee, CCPR/C/37/Add. 4, 7 April 1987); Luxembourg (Consideration of Report by Luxembourg to the Human Rights Committee, CCPR/C/79/Add.11, 28 December 1992); and the United Kingdom, in respect of Hong Kong (CCPR/C/79/Add.57, 1995, paragraph 19).

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.<sup>14</sup>

- 13. The Committee notes that disenfranchising any citizens of voting age from the right to vote is a significant trespass to those persons' rights and should only be provided for when clearly justified in a free and democratic society.**
- 14. The Committee notes that, under current NSW law, persons serving a prison sentence of 12 months or more are not entitled to vote.**
- 15. The Committee refers to Parliament the question of whether proposed cl 21(b1) of the Bill is an undue trespass on the right to freedom from discrimination and to equality before the law.**

***The Committee makes no further comment on this Bill.***

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<sup>14</sup> *General Comments No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), CCPR/C/21/Rev.1/Add.7, 12 July 1996, paragraph 14.*

## 8. SECURITY INDUSTRY AMENDMENT BILL 2005

|                       |                        |
|-----------------------|------------------------|
| Date Introduced:      | 21 June 2005           |
| House Introduced:     | Legislative Assembly   |
| Minister Responsible: | The Hon Carl Scully MP |
| Portfolio:            | Police                 |

The Bill has passed both Houses, and received the Royal Assent on 1 July 2005. Under s 8A(2) of the *Legislation Review Act*, the Committee is not precluded from reporting on a Bill because it has passed a House of the Parliament or become an Act.

### Purpose and Description

1. The Bill amends the *Security Industry Act 1997* (the Act) so as to:
  - expand the range of security activities that are required to be licensed under the Act;
  - exclude further categories of law enforcement officers from the application of the Act;
  - increase the maximum monetary penalty for offences under the Act;
  - create a class of provisional licences for new entrants to the security industry who carry on security activities of the kind covered by a class 1 licence (such as security guards, bodyguards and bouncers);
  - impose restrictions on the granting of licences on such grounds as security industry experience, liability for civil penalties and (in the case of applicants who are police officers) conflicts of interest;
  - impose conditions on the storage of firearms by those licensees who are authorised under the *Firearms Act 1996* (Firearms Act) to possess firearms;
  - modify the way in which applications for licences are investigated;
  - preserve the confidentiality of criminal intelligence concerning licence applicants;
  - further regulate the wearing of licences by licensees;
  - limit the delegation of functions under a licence, including by subcontracting;
  - modify the elements of certain offences;
  - further regulate the supervising, monitoring, rostering and scheduling of persons carrying on security activities;
  - extend the power of police officers to gather evidence of the commission of offences under the Act; and
  - provide for the establishment of a Security Industry Council.

### Background

2. The following background to the Bill was provided in the second reading speech:

Security Industry Amendment Bill 2005

[The Bill] is based on the Report of the statutory Review of the Security Industry Act 1997 and the Security Industry Regulation 1998, which was tabled in Parliament on 20 October 2004. The report made 30 recommendations for further improvements to the security industry including expansion of the licensing categories within the existing licence classes to better reflect the type of activities being undertaken by licence holders, and ensuring that guards who are performing specialist services have the appropriate training and qualifications.<sup>15</sup>

## The Bill

3. The Bill replaces the definition of ***security activity***, so that it includes:
- providing close personal protection or acting in a similar capacity;
  - acting as a venue controller or in a similar capacity;
  - carrying on control room operations, monitoring centre operations, retail loss prevention, airport security and infrastructure security and guarding using patrol dogs;
  - installing, maintaining, repairing or servicing equipment that is purported to be security equipment;
  - selling security equipment or equipment that is purported to be security equipment;
  - selling security methods or principles;
  - selling the services of security personnel;
  - identifying and analysing security risks and providing solutions, management strategies or both to minimise security risks;
  - assessing training, instruction or competencies in relation to security activities;
  - supervising or monitoring persons carrying on any security activities; and
  - acting as an agent for, obtaining contracts for or brokering any security activity or otherwise arranging by contract, franchise or otherwise for the purpose of employing or providing persons to carry on security activities [new s 4].<sup>16</sup>

## Provisional licences

4. Currently, apprentices or trainees who carry on security activities in the course of their apprenticeship or training with a licence holder are exempt from the application of the Act. This exemption is to be replaced by a system of *provisional licensing* of new entrants to the security industry, applicable only in relation to the security activities covered by a class 1 licence.<sup>17</sup>
5. It is an offence for the nominated employer of the holder of a provisional licence to fail to ensure that the holder is directly supervised [new s 29A], and for the holder of

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<sup>15</sup> Mr A P Stewart MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 21 June 2005.

<sup>16</sup> The Bill applies to the use of electronic means as well as physical means: amended s 4.

<sup>17</sup> The Bill provides for special conditions, including training requirements, in relation to class P1F licences for armed security guards: new s 23C.



a provisional licence to carry on a security activity authorised by that licence unless employed by a master licensee [new s 29B(2)].<sup>18</sup>

### Restrictions on granting licences

6. The Commissioner of Police may refuse to grant a licence if the applicant:
  - has not held a provisional licence for at least 12 months or has never been previously authorised by a class 1 licence to carry on the security activity to which the proposed licence relates [class 1 licence];
  - has not completed an approved security industry training course [provisional licence]; or
  - in the case of an application for a class 1 licence by a person who has previously held a licence to carry on the security activity to which the proposed licence relates - fails to demonstrate active participation or employment in the security industry during the term of the previous licence [new s 15(2)].
7. The Commissioner *must* refuse an application for a licence when:
  - satisfied that, within the period of 5 years before such application, the applicant had a civil penalty imposed on him or her by a court in New South Wales or elsewhere, being a civil penalty prescribed by the regulations [new s 16(1)(c)]; or
  - the applicant has, within the period of 10 years before such application, been removed or dismissed from NSW Police or any other police force on the ground of the applicant's integrity as a police officer [new s 16(1)(d)].<sup>19</sup>

### Investigation of licence applications

8. In the course of investigating applications and applicants, the Commissioner may also investigate each close associate of an applicant for a master licence [new s 18(6)(a)].<sup>20</sup> Applications for a licence made by any person who is currently, or was at any time, a police officer or a member of the police force of any other jurisdiction may be referred to the NSW Police Special Crime and Internal Affairs Branch.<sup>21</sup>

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<sup>18</sup> It is an offence for a person who holds a class 1 or class 2 licence to carry on a security activity unless the person is employed by a master licensee or is self-employed and holds a master licence: new s 29B(1).

<sup>19</sup> The Commissioner may also refuse to grant an application for a licence if the applicant has, within the period of 10 years before the application for the licence was made, been removed from the NSW Police on grounds other than the grounds of the applicant's integrity as a police officer [new s 16(4A)]; and *must* refuse to grant an application for a licence to a police officer or other member of NSW Police if the Commissioner considers that the grant of the licence would create a conflict of interest: new s 16A.

<sup>20</sup> The Commissioner may require an applicant for a class 1 licence who has previously held a class 1 or provisional licence to provide statements from previous employers about the duration of employment and the activities carried on by the applicant during the applicant's employment.

<sup>21</sup> The suitability of a police officer applicant being employed by any specified master licensee is a factor that the Special Crime and Internal Affairs Branch can consider: amended s 19.

## Issues Considered by the Committee

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

#### Procedural fairness: new s 29(3)

9. Currently, s 15(6) of the Act provides that, when determining whether an applicant is a fit and proper person, the Commissioner may have regard to certain criminal intelligence reports or other criminal information held in relation to the applicant,<sup>22</sup> and may revoke a licence if of the opinion that the licensee is *no longer* a fit and proper person to hold a licence [s 26(1)(c)].
10. The Bill ensures that any such information will remain confidential in the course of the review by the Administrative Decisions Tribunal of a decision to refuse to grant a licence or to revoke a licence [new s 29(3)].<sup>23</sup> It was noted in the second reading speech that the new section:
- is not designed to circumvent the appeals process, or hinder the ADT or the Courts in the exercise of their review functions. These bodies will still have the same opportunity to consider and weigh the probative value of the intelligence the Commissioner relied on to make his decision.
- However, the Bill will prevent the release of intelligence directly to the person *to whom the intelligence relates*. This will protect the safety of Police informants, and prevent the disclosure of Police information holdings and the details of Police methodology.<sup>24</sup> [Emphasis added]
11. While the Committee appreciates the aim of maintaining the confidentiality of such information, it is concerned that decisions may be made with potentially deleterious effects on a person's livelihood, without that person being aware of the material on which those decisions are based.

#### Procedural fairness

12. Procedural fairness, or natural justice, means that decision-makers must comply with certain obligations where any decision made may directly and adversely affect a person's rights, interests, status or legitimate expectations.
13. The relevant component of procedural fairness here is the *hearing rule*, ie, that those affected by a decision should be given an opportunity to participate in that decision-

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<sup>22</sup> Section 15(6) provides that, for the purpose of determining whether an applicant is a fit and proper person to hold the class of licence sought by the applicant, the Commissioner may have regard to any criminal intelligence report or other criminal information held in relation to the applicant that:

- (a) is relevant to the activities carried out under the class of licence sought by the applicant;
- (b) causes the Commissioner to conclude that improper conduct is likely to occur if the applicant were granted the licence; or
- (c) causes the Commissioner not to have confidence that improper conduct will not occur if the applicant were granted the licence.

<sup>23</sup> The note to the new section points out that Part 2 of Ch 5 of the *Administrative Decisions Tribunal Act 1997* does not therefore apply to any decision to refuse to grant a licence based on such information to the extent that it would require disclosure of the existence or content of any criminal intelligence report or other criminal information.

<sup>24</sup> Mr A P Stewart MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 21 June 2005.

making process. This common law rule has been described as both fundamental and universal.<sup>25</sup>

14. The High Court has held that it is to be *presumed* that procedural fairness will apply, and to then ask whether the terms of the relevant legislation display a clear intention to exclude the principle.<sup>26</sup>
15. Under new s 29(3), the ability of a person to gain a full and fair hearing is seriously impaired by the fact that he or she is unable to respond to information upon which the relevant decision is being made.

16. **The Committee notes that it is a fundamental common law rule that a person must be given an opportunity to participate in the decisions that affect him or her.**
17. **The Committee also notes that the provisions of new s 29(3) trespass upon this right by providing that a person may not be made aware of important information to be relied upon in determining an appeal against the refusal to grant, or the revocation of, a licence.**
18. **The Committee notes that the provision does not limit the Administrative Decision Tribunal's access to material on which the decision under review was based while preventing release of the material to the person to whom the intelligence relates.**
19. **The Committee refers to Parliament whether new s 29(3) unreasonably trespasses on an applicant's right to a fair hearing.**

#### **Rostering or scheduling: new s 38C**

20. The Bill provides that it is an offence for a person, for fee or reward, to roster or schedule the carrying on of any security activity by a licensee if that person is not eligible to hold a licence due to s 16 of the Act. Under section 16, a person is ineligible to hold a licence if, among other things:
  - (a) they have been convicted of a prescribed offence<sup>27</sup> in the last 10 years; or
  - (b) if they have been found guilty of a prescribed offence in the last 5 years but were not convicted because the court considered that the circumstances of the offence warranted no conviction being recorded.

The maximum penalty for this offence is 100 penalty units (currently \$11,000), or imprisonment for 6 months, or both [new s 38C].

21. This new offence raises a number of concerns for the Committee. First, the offence is an offence for which there is no fault element prescribed and thereby appears to impose strict liability. In its reports, the Committee has repeatedly expressed the view that providing for strict liability is a very serious matter and should:

<sup>25</sup> *Twist v Council of the Municipality of Randwick* (1976) 136 CLR 106, 110.

<sup>26</sup> See Kirby J in *Minister for Immigration and Multicultural Affairs, Re; Ex parte Miah* [2001] HCA 22, paragraph 183.

<sup>27</sup> "Prescribed offences" are set out clause 11 of the *Security Industry Regulation 1998* and include any Australian (or equivalent overseas) offences relating to firearms or weapons, or prohibited drugs, and certain offences relating to assault (if penalty imposed was imprisonment or a fine of \$200 or more), fraud, dishonesty, stealing and robbery.

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- be imposed only after careful consideration of all other options;
  - be subject to defences where contravention appears reasonable; and
  - have only limited monetary penalties and not terms of imprisonment.<sup>28</sup>
22. It is important to note that a person employed in rostering or scheduling security activity *does not* require a licence. Nor is it a condition of a master license that the master licensee not employ a person who falls within section 16 to prepare rosters for their other security staff. Therefore, the onus is on a convicted person to know that preparing such rosters would be an offence for them, and to avoid employment in which it might form part of their duties.
23. This is a considerable onus made even more burdensome by the fact that such a person does not need a licence to do the prohibited work and the fact that an employer does not have to alert the person to their potential ineligibility. A person faces very serious penalties if they fail to meet this onus, including very high fines and/or gaol.
24. Whilst ignorance of the law is generally no excuse, the offence is constructed in a way that makes it difficult for persons to have the knowledge needed to avoid its commission. Furthermore, the Bill provides no defence to the offence. This can be contrasted with a similar regime in which child sex offenders are prohibited from undertaking any child-related employment. Under NSW law,<sup>29</sup> very serious penalties apply for a person who commits this offence. However, even that law provides a person with a defence that they did not know the employment was “child-related”. No equivalent defence is provided for here. For these reasons, the Committee is of the view that the provision, as currently drafted, is potentially very unfair.
25. It is also unclear to the Committee why a person who was found guilty but did not have a conviction recorded against them, and therefore was found guilty of a very minor offence, should be prevented from undertaking employment that involves preparing a roster for a security detail.
26. The provision may also be regarded as discriminatory, and as exposing a person to double punishment for the same offence contrary to Article 14 of the ICCPR. The view is commonly expressed that, once a person has completed a sentence of imprisonment or has been otherwise penalised, they have paid their debt to society and should be left to live their life without having to continually face the stigma of their conviction.
27. This is the rationale behind the law on spent convictions.<sup>30</sup> Such law provides that convictions for certain offences cease to be convictions after 10 years or, in the case of juveniles, 5 years. The purpose of this law is to enable people with an old

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<sup>28</sup> In regard to penalties, the Committee notes that the Commonwealth Attorney General’s Department has developed guidelines for the use of strict liability. These guidelines provide that penalties for such offences should be limited to a maximum of 60 penalty units (\$6,600 for an individual or \$33,000 for a body corporate). Senate Standing Committee for the Scrutiny of Bills, *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, 26 June 2002.

<sup>29</sup> NSW *Child Protection (Prohibited Employment) Act 1998*.

<sup>30</sup> See the NSW *Criminal Records Act 1991*.

conviction to find employment and live as a fully integrated member of society without fear of discrimination or vilification on the ground of their old conviction.<sup>31</sup>

28. The Committee recognises that some offences may be relevant to certain activity and therefore a person may be required to disclose their conviction. The Committee also recognises that convictions for some offences may legitimately preclude the convicted person from undertaking certain activities, such as employment in a particular field. However, to protect a person from ongoing stigma and discrimination based on their prior conviction, that conviction should only be relevant where it was for an offence that is both of a certain level of seriousness and highly relevant to the activity they wish to undertake.
29. Where a person has been found guilty of an offence but not convicted, the Committee is of the view that very strong public interest justifications are needed to subject a person to an additional and subsequent punishment that may be more severe than the one imposed originally.
30. The Committee notes also that the penalty for this offence is very serious, involving possible terms of imprisonment. The Committee is of the view that this penalty may be excessive, especially given that there is no defence to this offence and the fact that it applies to a person who has no conviction recorded against them but who is, nonetheless, caught by section 38C.

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| <ol style="list-style-type: none"><li>31. <b>The Committee notes that new s 38C places a considerable onus of knowledge upon a person employed to roster or schedule licensees, and that there are severe penalties for failing to comply with the new section, including imprisonment.</b></li><li>32. <b>The Committee notes the importance of protecting convicted persons who have completed their sentence from stigma and discrimination to allow them, as far as practicable, to participate fully in society and reduce the likelihood of their recidivism.</b></li><li>33. <b>The Committee has written to the Minister expressing its concerns with respect to the potential for new s 38C to unduly trespass upon rights and liberties. In particular, the Committee has written to the Minister for:</b><ol style="list-style-type: none"><li>a) <b>advice as to why the Bill does not provide any mechanism by which a person could be alerted to the fact that they are prohibited from certain forms of employment based on their past offences (eg, a licensing regime);</b></li><li>b) <b>advice as to why the offence is a strict liability offence and why the Bill does not provide a defence, such as lack of knowledge;</b></li></ol></li></ol> |
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<sup>31</sup> The ICCPR, ICESCR and the Convention on the Rights of the Child all prohibit discrimination on several specified grounds and on "other status". International jurisprudence indicates that discrimination on the grounds of criminal record would fall into the "other status" category. See for example the decision of the European Court of Human Rights in *Thlimmenos v Greece*, 6 April 2000, Application No. 34369/97. See also S. Joseph, M. Schultz & M. Castan, *The International Covenant on Civil and Political Rights; Cases and Materials*, OUP, 2<sup>nd</sup> ed, 2004, p 689, which discusses UN Human Rights Committee decisions suggesting that a clearly definable group of people linked by their common status is likely to fall under the definition of 'other status'. These decisions are referred to in *Discrimination in Employment on the Basis of Criminal Record*; Discussion Paper, HREOC 2004, p 11, footnote 13.

- c) clarification on the need to subject a person who has been found guilty but not convicted of an offence to the prohibition in section 38C;**
- d) advice on the public interest justifications behind the Bill potentially subjecting a person to a double punishment, especially a person who has not had a conviction recorded against them; and**
- e) advice on the justification for the high penalty for this offence, including a term of imprisonment, especially given that there is no fault element for the offence and the offence applies to a person who has no recorded conviction.**

### **Strict liability: Schedule 1 [65]**

34. The Bill provides for a maximum penalty of 100 penalty units (\$11,000) for an individual and imprisonment for six months for offences for which there is no statutory fault requirement and no statutory defences. These offences include subcontracting security work without the client co-signing the contract between the principal and subcontractor, and supervising or monitoring the performance of certain licensed persons for fee or reward without the appropriate licence [ss s8A & 38B].
35. As noted above, the Committee does not consider that imprisonment should normally be available for offences for which there is no fault element.

- 36. The Committee considers that offences for which there is no fault element should not normally be punishable by imprisonment.**
- 37. The Committee has written to the Minister to seek his advice as to the reasons for including imprisonment as a penalty for offences without a fault element in Schedule 1[65].**

### **Reversal of onus: amended s 39**

38. Prior to the Bill's amendments, the Act provided that it was an offence for a master licensee to *knowingly* employ any person to carry on any security activity if that person is not the holder of a licence [s 39].
39. The Bill removes the word "knowingly" from s 39, thereby placing the onus on the master licensee to check the licensing status of every employee.<sup>32</sup> The maximum penalty is also increased from 40 penalty units to 100 penalty units (currently \$11,000) and imprisonment for 6 months for an individual, or 200 penalty units for a corporation (currently \$22,000).
40. It is a defence to a prosecution under s 39 of the Act if the master licensee can show that the master licensee did not know, and could not reasonably have been expected to know, that the person was unlicensed [new s 39(2)].
41. This amendment has two practical effects:

<sup>32</sup> The Bill also extends the existing prohibition on employment of certain persons by master licensees to also prohibit the *provision* of such persons: amended s 23.

- it criminalises employing an unlicensed person to carry on a security activity in circumstances where the master licensee could reasonably have known that the person was not licensed;
  - it requires that the defendant prove their lack of knowledge, and the reasonableness of that lack of knowledge, to avoid liability for employing an unlicensed person.
42. While the former effect appears reasonable, the latter effect reverses the traditional burden of proof, whereby the prosecution must prove each element of an offence. This burden of proof forms part of the presumption of innocence,<sup>33</sup> which is well recognised as a fundamental human right, protected under the common law<sup>34</sup> and under international law.<sup>35</sup>
43. The Committee has previously noted that placing more than an evidential burden<sup>36</sup> on defendants has been held to unduly trespass on the presumption of innocence in the United Kingdom, Canada and South Africa, and that those defendants normally have no more than an evidential burden under the Commonwealth *Criminal Code*.<sup>37</sup> In this regard, the Committee again notes the House of Lords' comment that the right to be presumed innocent under Art 6 of the *European Convention of Human Rights*:

is not absolute and unqualified, the test to be applied is whether the modification or limitation of that right pursues a legitimate aim and whether it satisfies the principle of proportionality. It is now well settled that the principle which is to be applied requires a balance to be struck between the general interest of the community and the protection of the fundamental rights of the individual. This will not be achieved if the reverse onus provision goes beyond what is necessary to accomplish the objective of the statute.<sup>38</sup>

- 44. The Committee notes that placing more than an evidential burden of proof has at times been held to unduly trespass upon the presumption of innocence, a fundamental human right recognised at common law and international law.**
- 45. The Committee has written to the Minister for advice as to the reasons for placing a legal rather than an evidential burden on defendants under s 39.**

<sup>33</sup> "The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence... If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused." Dickson CJ in the Canadian Supreme Court, *R v White* (1998) 51 DLR (4<sup>th</sup>) 481.

<sup>34</sup> The so-called "golden thread" per Sankey LJ in *Woolmington v DPP* (1935) AC 462 (HL).

<sup>35</sup> See Article 14(2) of the *International Covenant on Civil and Political Rights*, which states that: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law".

<sup>36</sup> Namely, the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist: section 13.3 of the Commonwealth *Criminal Code*.

<sup>37</sup> See the Committee's report on the Crimes Legislation Amendment (Terrorism) Bill 2004 and the Sydney Opera House Trust Amendment Bill 2004: Legislation Review *Digest* 10 of 2004.

<sup>38</sup> Lord Hope of Craighead in *R v Lambert* [2001] UKHL 37 at paragraph 88.

**Attributing personal liability for corporate conduct and reversing onus of proof: new s 44**

46. The Bill modifies the provision that makes the directors of a corporation also liable for any offence committed by the corporation.
47. New s 44(1) provides that if a corporation contravenes, whether by act or omission, any provision of the Act or the regulations, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision, unless the person satisfies the court that:
- (a) the corporation contravened the provision without the knowledge actual, imputed or constructive of the person;
  - (b) the person was not in a position to influence the corporation in relation to its contravention of the provision; or
  - (c) the person, if in such a position, used all due diligence to prevent the contravention by the corporation.
48. Although new s 44(1) does not set out the standard of proof that is to apply, the term “satisfies the court” used in this context is routinely interpreted as imposing a balance of probabilities standard.
49. The amendments represent a departure from traditional principles of criminal responsibility in three respects:
- the offence of one legal “person” (the corporation) is attributed to another person (individual directors and others) in circumstances that go beyond the reach of conventional rules for extending liability (complicity);<sup>39</sup>
  - s 44(1) places the burden of proof on the accused to prove, in effect, the absence of the requisite fault element; and
  - under the terms of new s 44(1)(c), criminal liability may arise where there has been an absence of due diligence on the part of the individual. This is an objective test and a lower fault standard than the traditional subjective *mens rea* standards.
50. To the extent that s 44(1) departs from traditional principles, it may be considered to trespass on personal rights and liberties in that it exposes individuals to criminal responsibility in circumstances which are wider, and according to standards which are lower - with respect to both the fault element *and* the burden of proof - than those which have been traditionally associated with the criminal law.
51. However, the Committee notes that departures from traditional principles of criminal responsibility of the sort found in s 44 are by no means unprecedented. In fact, they have become an increasingly common feature of legislative offences, particularly in “regulatory” fields such as occupational health and safety, and environment protection: see, eg, s 169 of the *Protection of the Environment Operation Act 1997*.

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<sup>39</sup> Ordinarily, in order for a person to be convicted of being an accessory to a crime committed by another, the prosecution must prove that the alleged accessory encouraged or assisted the principal offender to engage in the criminal offence (see, eg, *Phan* [2001] NSWCCA 29), and that they had the intention to encourage or assist: see *Giorgianni* (1985) 156 CLR 473.



## Reverse Onus

52. As noted above, reversing the onus of proof is inconsistent with the presumption of innocence and “requires a balance to be struck between the general interest of the community and the protection of the fundamental rights of the individual.”<sup>40</sup>
53. As also noted above and in previous *Digests*,<sup>41</sup> this balance can normally be achieved by placing no more than an evidential burden on the defendant.

## Fault Element – Due Diligence

54. The extent to which a reverse onus provision trespasses on individual rights and liberties may be exacerbated by the fault element of the offence. Placing the burden of proof on the accused, and assessing fault according to an objective standard (eg, absence of due diligence or negligence), is a more significant interference with rights and liberties than placing the burden of proof on the accused and assessing fault according to a subjective standard such as intent, knowledge or recklessness.
55. Reliance on a due diligence standard (and the absence of a “knowledge” standard) in new s 44 is consistent with the policy objective that underlies the Act, namely to encourage directors and others concerned in the management of corporations to personally take care (ie, act with due diligence) to ensure the safety of the community with respect to the operations of the corporation in the security industry.
56. As the Australian Law Reform Commission has noted:
- Deeming an individual to be responsible for the conduct of the corporation (unless that person can prove a defence) is one method of ensuring that ‘someone pays’ for the misconduct.<sup>42</sup>
57. In declining to make any recommendations regarding reversing the onus of proof when deeming persons liable for the actions of another, the Commission also noted that:
- legislators must always balance efficacy arguments for reversing the onus of proof against fairness issues such as the harshness of the penalty and the impact on the segment of the regulated community that is likely to be subject to the deeming provision.<sup>43</sup>

**58. The Committee notes that reversing the onus of proof is inconsistent with the fundamental right of a person to be presumed innocent and requires a balance to be struck between the general interest of the community and the protection of the fundamental rights of the individual. This will not be achieved if the reverse onus provision goes beyond what is necessary to accomplish the objective of the statute.**

<sup>40</sup> Lord Hope of Craighead in *R v Lambert* [2001] UKHL 37 at paragraph 88.

<sup>41</sup> For example, the Committee’s report on the Crimes Legislation Amendment (Terrorism) Bill 2004 and the Sydney Opera House Trust Amendment Bill 2004: Legislation Review *Digest* 10 of 2004.

<sup>42</sup> Australian Law Reform Commission, Report No. 95, *Principled Regulation: Civil and Administrative Penalties in Australian Federal Regulation* para 8.57:  
<[www.austlii.edu.au/au/other/alrc/publications/reports/95/08.Liability\\_of\\_Corporate\\_Officers.html](http://www.austlii.edu.au/au/other/alrc/publications/reports/95/08.Liability_of_Corporate_Officers.html)>.

<sup>43</sup> Australian Law Reform Commission, Report No. 95, *Principled Regulation: Civil and Administrative Penalties in Australian Federal Regulation*, para 8.61:  
<[www.austlii.edu.au/au/other/alrc/publications/reports/95/08.Liability\\_of\\_Corporate\\_Officers.html](http://www.austlii.edu.au/au/other/alrc/publications/reports/95/08.Liability_of_Corporate_Officers.html)>.

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| <p><b>59. The Committee again notes that this balance can normally be achieved by placing no more than an evidential burden on the defendant.</b></p> <p><b>60. The Committee also notes the important policy objectives of the Act to ensure the safety of the community in the course of the commercial provision of security services.</b></p> <p><b>61. The Committee refers to the Parliament the question as to whether new s 44 unduly trespasses on personal rights and liberties.</b></p> |
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*The Committee makes no further comment on this Bill.*

## 9. SMOKE-FREE ENVIRONMENT AMENDMENT (MOTOR VEHICLE PROHIBITION) BILL 2005\*

Date Introduced: 21 June 2005  
House Introduced: Legislative Council  
Member Responsible: The Hon Fred Nile MLC

### Purpose and Description

1. The Bill's object is to amend the *Smoke-free Environment Act 2000* (the Act) to prohibit smoking in motor vehicles.

### Background

2. The following was noted in the second reading speech:

This bill deals with an important health issue regarding the harmful effects of passive smoke. It deals also with road safety issues resulting from many reports that drivers smoking cigarettes cause accidents when they drop ash onto their dresses or trousers. This bill aims to eliminate or reduce the danger of fires during the bushfire season when drivers or passengers throw cigarette butts out of a car window and onto a country road.<sup>44</sup>

### The Bill

3. The Bill inserts into s 4 of the Act a definition of *motor vehicle*, which is to have the same meaning as in the *Road Transport (General) Act 1999*, ie, a vehicle that is built to be propelled by a motor that forms part of the vehicle.
4. The Bill provides that it is an offence to smoke in a motor vehicle at any time. The proposed maximum penalty is 5 penalty units (currently \$550).

### Issues Considered by the Committee

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

*The Committee makes no further comment on this Bill.*

<sup>44</sup> The Hon F J Nile MLC, Legislative Council *Hansard*, 21 June 2005.

## **SECTION B: MINISTERIAL CORRESPONDENCE — BILLS PREVIOUSLY CONSIDERED**

### **10. BUILDING PROFESSIONALS BILL 2005**

#### **Background**

1. The Committee considered this Bill at its meeting on 3 June 2005 and resolved to write to the Minister to express its concern that the Bill did not protect the right against self incrimination in civil proceedings.
2. The Bill required a person to provide information regardless of whether that information might tend to incriminate the person. While the Bill did provide that any information given could not be used in criminal proceedings against that person, it did not limit use of the information in civil proceedings.
3. The Committee expressed its concern that, as a result, the Bill unduly trespassed on the fundamental right of a person not to be forced to incriminate him or herself.

#### **The Minister's Reply**

4. In her reply of 22 June 2005, the Minister stated, "the use of the information obtained through waiving the privilege against self incrimination is particularly important in disciplinary proceedings." Further, these "proceedings are necessary to ensure the enforcement and effectiveness of the framework created under the Bill, particularly to ensure the safety and quality of buildings".

5. The Minister also stated that:

Other civil proceedings in which self-incrimination information may be used are where injunctions are sought under the *Environmental Planning and Assessment Act* to prevent a person from breaching that Act. Injunctions may be obtained against persons who are not accredited certifiers and therefore will not be subject to measures under the Building Professionals Bill such as suspension.

Both disciplinary proceedings and the seeking of injunctions are actions taken to protect the public rather than punish the individual concerned.

Under the circumstances I consider the ability to use self-incriminating information in civil proceedings to be justified.

#### **The Committee's Response**

6. **The Committee thanks the Minister for her reply.**



PARLIAMENT OF NEW SOUTH WALES  
LEGISLATION REVIEW COMMITTEE

3 June 2005

Our Ref: LRC1270

The Hon Diane Bearer MP  
Minister Assisting the Minister for Infrastructure  
and Planning (Planning Administration)  
Level 33 Governor Macquarie Tower  
1 Farrer Place  
Sydney NSW 2000

Dear Minister

**Building Professionals Bill 2005**

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 2005*.

The Committee resolved to write to you to raise its concerns with this Bill and to seek your advice. Specifically, the Committee notes that information which may tend to incriminate a person but which is required to be provided by that person under clause 59 cannot be used in criminal proceedings against that person. However, the Bill does not provide that the information obtained pursuant to clause 59 cannot be used in civil proceedings against the person who is required to give the information.

The Committee is concerned that, as a result, clause 59 unduly trespasses on the fundamental right of a person not to be forced to incriminate him or herself, a right recognised under the common law and under international law.

The Committee notes that this right applies to both criminal and civil proceedings and refers you to the High Court decision in *EPA v Caltex* (1993) 178 CLR 447, in which Mason CJ and Toohey J stated that:

the privilege against self-incrimination protects an accused person who is required by process of law to produce documents which tend to implicate that person in the commission of the offence charged. The privilege likewise protects a person from producing in other proceedings, including civil proceedings, documents which might tend to incriminate that person.

It has become relatively common for laws in New South Wales to compel persons to provide information the Government requires when that information is peculiarly within the knowledge of the person, even though to do so may incriminate him or her. Such laws are usually made in the context of issues of great public concern, such as public safety.

The Committee is of the view that such legislation should only be made with clear and proper justification on significant public interest grounds. Further, where possible, it should avoid providing for a blanket removal of the right but distinguish between situations in which there is some serious matter of public interest at stake and those where less serious matters arise. In the former case derogation of the right may be warranted. In the latter case, it may be possible to obtain the information from another source or in a way that does not require derogation. The Committee notes that clause 59 does not make any such distinctions but provides for a blanket removal of the fundamental right of a person to remain silent.

In line with the view that any derogation of the right not to incriminate oneself should be the minimum necessary to achieve an aim in the public interest and in proportion to that aim, the Committee considers that the use of information obtained in breach of the privilege should be constrained as much as practicable. Consequently, the use of such information in civil proceedings and the indirect use of such information should likewise be the minimum necessary to achieve an aim in the public interest and in proportion to that aim.

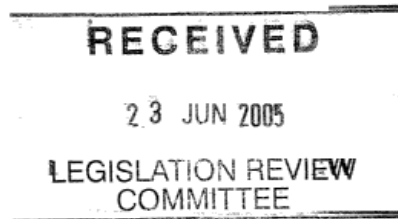
The Committee considers that ensuring that buildings are safe and meet applicable planning controls are matters of sufficient public importance to warrant the abrogation of the privilege against self-incrimination to the extent necessary to achieve that aim and proportionate to that aim.

Nonetheless, the Committee seeks your advice as to why the Bill does not provide a restriction on the use of self-incriminating information in civil proceedings against a person forced under clause 59 to provide that information.

Yours sincerely



Peter Primrose MLC  
Chairman

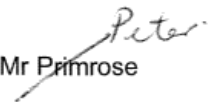


Minister for Juvenile Justice  
Minister for Western Sydney  
Minister Assisting the Minister for  
Infrastructure and Planning (Planning Administration)

The Hon Peter Primrose MLC  
Chairman  
Legislative Review Committee  
Parliament of New South Wales  
Macquarie Street  
NSW 2000

Y05/1768

22 JUN 2005

  
Dear Mr Primrose

I refer to your letter requesting advice on the proposed section 59 of the Building Professionals Bill 2005 which deals with self incrimination.

The use of information obtained through waiving the privilege against self incrimination is particularly important in disciplinary proceedings. These proceedings may be conducted by either the Building Professionals Board or the Administrative Decisions Tribunal. Such proceedings are necessary to ensure the enforcement and effectiveness of the framework created under the Bill, particularly to ensure the safety and quality of buildings.

Other civil proceedings in which self incriminating information may be used are where injunctions are sought under the *Environmental Planning and Assessment Act* to prevent a person from breaching that Act. Injunctions may be obtained against persons who are not accredited certifiers and therefore will not be subject to measures under the Building Professionals Bill such as suspension.

Both disciplinary proceedings and the seeking of injunctions are actions taken to protect the public rather than punish the individual concerned.

Under the circumstances, I consider the ability to use self incriminating information in civil proceedings to be justified.

I appreciate the comments of the Committee on the Bill and trust that the above information is of assistance.

Yours sincerely

  
The Hon Diane Beamer MP

Level 33, Governor Macquarie Tower,  
1 Farrer Place, Sydney NSW 2000  
Tel: (02) 9228 4130 Fax: (02) 9228 4131  
Email Address: office@beamer.minister.nsw.gov.au

# 11. CRIMINAL PROCEDURE FURTHER AMENDMENT (EVIDENCE) BILL 2005

## Background

1. The Bill introduced an offence of allowing access to sensitive evidence, the terms of which appeared to include situations where a person given access to a thing by a prosecuting authority may inadvertently have offended against the proposed section.
2. On 1 April 2005 the Committee wrote to the Attorney General seeking his advice as to the need for the provision of strict liability with a maximum penalty of 100 penalty units, and 2 years imprisonment, in relation to accessing sensitive evidence.

## The Attorney General's reply

3. On 21 June 2005 the Committee received the Attorney's response. He noted therein that the Government believes that the offence and the penalty are appropriate for the following reasons:
  - the Act sets up an elaborate scheme to protect extremely sensitive material; if a person is granted access to that material the prosecuting authorities will ensure that they are informed of the prohibitions on disseminating this material without authority;
  - in light of this, the general intent required to undertake the physical elements of the offence, copying the material, giving the material to another person, removing the material - all without proper authority - justifies the level of the penalty; and
  - the offence does not exclude common law defences, so if a person did mistakenly have a belief that they were authorised to do any of these things, then they can avail themselves of the common law defence of "honest and reasonable mistake of fact".

## The Committee's response

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| 4. <b>The Committee thanks the Attorney General for his reply.</b> |
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PARLIAMENT OF NEW SOUTH WALES  
LEGISLATION REVIEW COMMITTEE

1 April 2005

File ref: LRC1201

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

Dear Attorney

**Criminal Procedure Amendment (Evidence) Bill 2005**

The Committee has considered this Bill under s 8A of the *Legislation Review Act 1987*.

The Committee notes that proposed s 281D(7) introduces an offence relating to access to sensitive evidence for which there is no fault element.

The maximum penalty is 100 penalty units (currently \$11,000), or 2 years imprisonment, or both.

As a general rule, the Committee considers that strict liability:

- should only be applied after careful consideration of all available options;
- should, wherever possible, be subject to defences in circumstances where the contravention appears reasonable; and
- should be applied only where the penalty does not include imprisonment and there is a reasonable limit to any monetary penalty (in this regard the Committee notes the Commonwealth Attorney General's Department's guideline of a limit of 60 penalty units).

The Committee seeks your advice as to the need for the provision of strict liability with a maximum penalty of 100 penalty units and 2 years imprisonment in relation to accessing sensitive evidence.

Yours sincerely

A handwritten signature in cursive script that reads 'Peter Primrose'.

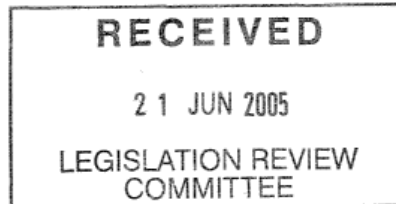
Peter Primrose MLC  
Chairman



ATTORNEY GENERAL

2005/CLRD0233  
LRC1201

The Hon Peter Primrose MLC  
Chairman  
Legislation Review Committee  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000



Dear Mr Primrose,

**Criminal Procedure Further Amendment (Evidence) Bill 2005**

Thank you for your letter dated 1 April 2005 commenting on the *Criminal Procedure Further Amendment (Evidence Bill) 2005*.

Your letter raised the issue of the offence created under s 281D(7) in relation to improper accessing of sensitive evidence.

The Committee has stated that "strict liability offences":

- should only be applied after careful consideration of all available options;
- should be the subject of defences; and
- should only be applied where the penalty does not include imprisonment and there is a reasonable limit to any monetary penalty.

The Government believes that the offence and the penalty are appropriate for the following reasons:

- The Act sets up an elaborate scheme to protect extremely sensitive material; if a person is granted access to that material the prosecuting authorities will ensure that they are informed of the prohibitions on disseminating this material without authority.
- In light of this, the general intent required to undertake the physical elements of the offence, copying the material, giving the material to another person, removing the material – all without proper authority, justifies the level of the penalty.
- Of course the offence does not exclude common law defences, so if a person did mistakenly have a belief that they were authorised to do any of these things, then they can avail themselves of the common law defence of "honest and reasonable mistake of fact".

Yours sincerely

A handwritten signature in black ink, appearing to read 'Bob Debus'.  
**BOB DEBUS**

## 12. ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (INFRASTRUCTURE AND OTHER PLANNING REFORM) BILL 2005

### Background

1. The Committee reported on the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005* in *Legislation Review Digest No 7 of 2005*.
2. On 3 June 2005, the Committee wrote to the Minister for Infrastructure and Planning seeking advice on three issues:
  - why the Bill contains no requirements regarding the qualifications or attributes of persons who may be appointed as authorised officers to exercise powers (eg. entry, search and seizure powers) that may impact on personal rights and liberties;
  - why the Bill makes no provision for an objector to appeal to the Land and Environment Court against the Ministerial approval of a concept plan, since this may impact on persons adversely affected by development undertaken under than plan; and
  - why the Bill does not give Parliament any role in making or scrutinising guidelines with respect to environmental assessment requirements and controls.
3. The Bill was assented to on 16 June 2005.

### The Minister's reply

4. The Minister's response dated 24 June 2005 addresses these issues.

### Authorised officers

5. On this issue, the Minister states:

In providing for the appointment of authorised officers under the proposed section 1221, the Bill largely continues the current section 118A of the Act which does not restrict who may be appointed as an authorised officer.

[T]he new provision is consistent with the regime for authorised officers under the *Protection of the Environment Operations Act 1997*. It allows for the necessary flexibility in appointing appropriately qualified departmental officers and expert consultants, who may not be departmental employees, to conduct investigations into what may well be quite complex environmental management issues to ensure compliance with approvals given under the proposed Part 3A.

Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005

The legislation will enable the Director-General of the Department of Infrastructure Planning & Natural Resources to ensure that appropriate limitations are placed on authorised officers' powers.

### **Objector appeals**

6. The Minister advises that:

The Bill seeks to strike a balance between encouraging investment and jobs in New South Wales and encouraging community participation in planning decision making. Objector appeals are currently only permitted under the EP&A Act for designated developments which are determined under Part 4 of the Act. There are no objector appeals against government infrastructure proposals which may have similar impacts but are currently assessed under Part 5 of the Act.

By introducing a concept plan in proposed Part 3A the Bill provides for an additional level of strategic environmental assessment for those projects or programs that are required to obtain a concept plan. The concept plan will provide the community with an additional, early, and effective opportunity to examine environmental assessments for a range of options for major projects and make submissions on preferred alternatives.

After approval of a concept plan, the community will usually have a second opportunity to examine and comment on a more detailed environmental assessment about the project.

In this way the Bill will enable the community to be involved much earlier in the development of proposals than is the case under the existing legislation. At the same time the Bill seeks to encourage investment in New South Wales and jobs for the community by providing proponents with some certainty once the concept plan is assessed and approved. The limitation in the Bill on objector appeals when a concept plan is approved is one element in providing this certainty.

### **Delegation of the setting of environmental assessment requirements and controls**

7. On this issue, the Minister states:

Unlike the current provisions in Part 4 and Part 5 of the Act which adopt a one size fits all standard that can be administered by a range of local & public authorities, environmental assessment under Part 3A of the Act will be administered by the Department. At the same time, the Bill also removes the need to obtain certain approvals under other Acts but provides for the assessment requirements relating to those issue specific approvals to be addressed in Part 3A.

In these circumstances the Bill provides New South Wales with a significant one-off opportunity to build an outcome focussed and value adding assessment regime that can direct and target levels of environmental assessment to address the real social, economic and environmental impacts that arise from specific proposals.

This is only possible by consolidating the environmental assessment requirements in one place - the guidelines made under the proposed Part 3A - rather than having them scattered throughout various Acts, regulations, environmental planning instruments, development control plans, policies and guidelines as is the case now: a labyrinth of inconsistent rules and procedures that have increased cost and delayed investment.

This opportunity would be lost if all those rules and procedures had to be re-codified in legislation as the committee proposes.

These guidelines will be adopted after consultation with the Minister for the Environment. In many ways this merely reflects the existing procedures for the making [of] environmental planning instruments under the EP&A Act which have long been delegated by Parliament to the executive. As such Parliamentary scrutiny of the environmental assessment requirements under Part 3A of the bill will be no different to its scrutiny of other aspects of environmental planning in New South Wales.

### **The Committee's response**

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

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3 June 2005

Our Ref: LRC1273

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  
(Infrastructure and Other Planning Reform) Bill 2005**

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 2005*.

The Committee resolved to write to you to seek your advice on a number of matters.

**Authorised Officers**

Proposed section 122I allows the Director-General to appoint "any person" as an authorised officer for the purposes of Part 6, Division 2C (Departmental enforcement powers).

Such authorised officers have significant powers that may impact adversely on personal rights and liberties, including powers to enter and search premises, seize anything believed to be connected with an offence against the *Environmental Planning and Assessment Act 1979*, and compel the provision of information.

The Committee has previously expressed the view that, when legislation conveys on persons administrative powers that can significantly affect personal rights, it should include appropriate limits as to who may be authorised to exercise those powers.

The Committee seeks your advice as to why there are no requirements regarding the qualifications or attributes of persons who may be appointed as authorised officers under the Bill.

**Objector appeals**

The Committee considers that decisions which may impact on a person's rights, liberties and obligations should normally be subject to review.

The Committee notes that approval of a concept plan may significantly impact on persons adversely affected by development that would normally be categorised as designated development within that plan.

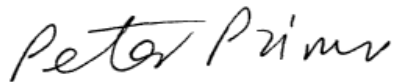
The Committee seeks your advice as to why the Bill makes no provision for an objector to appeal against the approval of a concept plan.

**Environmental Assessment Requirements**

The Committee notes that a vital component of the regime for approving major infrastructure and other projects in proposed Part 3A is the setting of environmental assessment requirements. It also notes that the regime in proposed Part 3A stands in the place of numerous statutory environmental protections and controls in regard to approved projects.

The Committee would therefore be grateful for your advice as to why the Bill does not give Parliament any role in the making or scrutinising of the guidelines with respect to environmental assessment requirements.

Yours sincerely



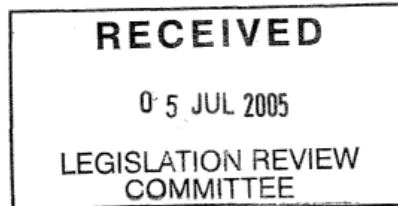
Peter Primrose MLC  
Chairman

Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005



MINISTER FOR INFRASTRUCTURE AND PLANNING  
MINISTER FOR NATURAL RESOURCES

Mr Peter Primrose MLC  
Parliament of New South Wales  
Chairman  
Legislation Review Committee  
Macquarie Street  
Sydney NSW 2000



24 JUN 2005

Dear Mr Primrose

I am writing to thank you for your letter about the *Environmental Planning & Assessment Amendment (Infrastructure & other Planning Reform) Bill 2005*.

The Bill represents the most significant reform of the planning system since the introduction of planning legislation in New South Wales after the Second World War.

I note the committee's particular concerns and answer them each in turn.

**Authorised officers**

In providing for the appointment of authorised officers under the proposed section 122I, the Bill largely continues the current section 118A of the Act which does not restrict who may be appointed as an authorised officer.

I note that the new provision is consistent with the regime for authorised officers under the *Protection of the Environment Operations Act 1997*. It allows for the necessary flexibility in appointing appropriately qualified departmental officers and expert consultants, who may not be departmental employees, to conduct investigations into what may well be quite complex environmental management issues to ensure compliance with approvals given under the proposed Part 3A.

The legislation will enable the Director-General of the Department of Infrastructure Planning & Natural Resources to ensure that appropriate limitations are placed on authorised officers' powers.

**Objector appeals**

The Bill seeks to strike a balance between encouraging investment and jobs in New South Wales and encouraging community participation in planning decision making. Objector appeals are currently only permitted under the EP&A Act for designated developments which are determined under Part 4 of the Act. There are no objector appeals against government infrastructure proposals which may have similar impacts but are currently assessed under Part 5 of the Act.

By introducing a concept plan in proposed Part 3A the Bill provides for an additional level of strategic environmental assessment for those projects or programs that are required to obtain a concept plan. The concept plan will provide the community with an additional, early, and effective opportunity to examine environmental assessments for a range of options for major projects and make submissions on preferred alternatives.

After approval of a concept plan, the community will usually have a second opportunity to examine and comment on a more detailed environmental assessment about the project.



In this way the Bill will enable the community to be involved much earlier in the development of proposals than is the case under the existing legislation. At the same time the Bill seeks to encourage investment in New South Wales and jobs for the community by providing proponents with some certainty once the concept plan is assessed and approved. The limitation in the Bill on objector appeals when a concept plan is approved is one element in providing this certainty.

Given the enhanced community participation offered by the introduction of concept planning, the limited circumstances in which objector appeals are currently permitted under the Act, the government believes the Bill strikes an appropriate balance between community participation in the planning process and the provision of certainty to encourage investment and jobs in the State.

#### **Environmental assessment requirements**

The new regime of environmental, social and economic assessment of major projects proposed in Part 3A of the Bill was developed after 15 years of environmental assessment practice by the Department of Infrastructure Planning & Natural Resources of major projects under Part 4 and later Part 5 of the EP&A Act.

Unlike the current provisions in Part 4 and Part 5 of the Act which adopt a one size fits all standard that can be administered by a range of local & public authorities, environmental assessment under Part 3A of the Act will be administered by the Department. At the same time, the Bill also removes the need to obtain certain approvals under other Acts but provides for the assessment requirements relating to those issue specific approvals to be addressed in Part 3A.

In these circumstances the Bill provides New South Wales with a significant one-off opportunity to build an outcome focussed and value adding assessment regime that can direct and target levels of environmental assessment to address the real social, economic and environmental impacts that arise from specific proposals.

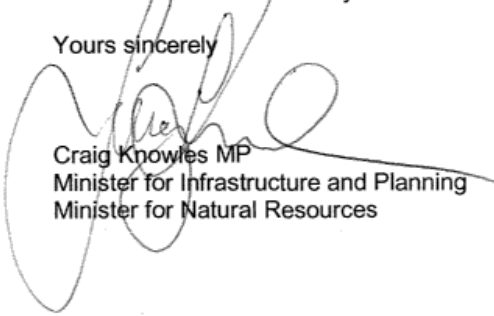
This is only possible by consolidating the environmental assessment requirements in one place - the guidelines made under the proposed Part 3A - rather than having them scattered throughout various Acts, regulations, environmental planning instruments, development control plans, policies and guidelines as is the case now: a labyrinth of inconsistent rules and procedures that have increased cost and delayed investment.

This opportunity would be lost if all those rules and procedures had to be re-codified in legislation as the committee proposes.

These guidelines will be adopted after consultation with the Minister for the Environment. In many ways this merely reflects the existing procedures for the making environmental planning instruments under the EP&A Act which have long been delegated by Parliament to the executive. As such Parliamentary scrutiny of the environmental assessment requirements under Part 3A of the bill will be no different to its scrutiny of other aspects of environmental planning in New South Wales.

The Government is convinced that the Bill will introduce a more effective system of environmental assessment for major projects that will lead to better informed decision making, and better outcomes for the community.

Yours sincerely



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

## 13. LOCAL GOVERNMENT AMENDMENT BILL 2005

### Background

1. The Committee considered this Bill at its meeting on 20 June 2005 and reported on it in *Legislation Review Digest* No 8 of 2005. The Committee resolved to write to the Minister for further clarification as to the full scope of the freedom of information (FOI) exemption in the Bill and whether the Bill's objects could be achieved by a more limited exemption (attached).
2. On 22 June 2005, this Bill was the subject of debate in the Legislative Council on a number of issues, including the rationale for, and scope of, the FOI exemption.<sup>45</sup> It was emphasised during this debate that the FOI exemption would apply only to particular types of complaints and investigations, including those relating to pecuniary interest matters or acts of misbehaviour or maladministration.
3. The Local Government Amendment Bill was assented to on 1 July 2005 and was commenced, with the exception of Schedule 1[6], on 15 July 2005.

### The Minister's Reply

4. In his reply of 5 September 2005, the Minister states the decision to seek a limited FOI exemption:

was taken with due regard to the importance of freedom of information. However, as your letter acknowledges, there are a number of situations where this legislation must seek a balance between rights of access and the potential harm such access could cause, having regard to the public interest.
5. The Minister also responded to the Committee on the question of whether a more limited exemption could achieve the objective sought to be achieved:

I do not consider the amending Act's objects could be achieved by a more limited exemption. As previously noted, the amendment is in line with exemptions granted to other agencies carrying out complaint handling and investigative functions...

An alternative approach might have to consider a generic exemption for complaints and investigations related material. However, such an exemption would have had a much more significant impact on access rights.
6. The Minister also advised that the Department's FOI policy is that "any reasonable request for documents held by the Department will be favourably considered and that, where possible, access will be granted informally and free of charge".

### The Committee's Response

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

<sup>45</sup> The Hon. Henry Tsang MLC, second reading speech, Legislative Council *Hansard*, 22 June 2005 and subsequent debate.



PARLIAMENT OF NEW SOUTH WALES  
LEGISLATION REVIEW COMMITTEE

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20 June 2005

Our Ref: LRC1292

Your Ref:

The Hon Tony Kelly MLC  
Minister for Local Government  
Level 34, Governor Macquarie Tower  
1 Farrer Place Sydney NSW 2000

Dear Minister

#### **LOCAL GOVERNMENT AMENDMENT BILL 2005**

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 8 of 2005*.

The Committee resolved to write to you for clarification of the scope of the proposed exemption of your Department from the operation of the *Freedom of Information Act*.

The Committee is of the view that freedom of information is an important principle of democracy and the rule of law, and that individuals have a general right to access information held by government. Therefore, expanding the list of agencies or activities of agencies that are exempt from the operation of the *FOI Act* trespasses on individual rights by reducing access to information held by government. Importantly, it may also diminish the accountability of agencies, which hold such information.

The Committee is also of the view that the right to freedom of information is not absolute. However, legislation that restricts or removes access to information held by government needs to be justified on strong public interest grounds and such restriction should only be made to the extent necessary to achieve the desired result.

The Committee notes the fact that both public access to information about complaints against local councils and allowing the Department to conduct its investigations into such complaints without undue hindrance, are matters of significant public interest. Both, in their respective ways, enhance anti-corruption measures and strengthen democratic principles and the rule of law.

The Committee notes the advice of your office that there have been instances in which a person with information pertinent to a complaint against a council or councillor has declined to give that information on the basis that the information they give would be subject to disclosure under the FOI regime. Furthermore, the Committee notes that the exemption in the Bill is consistent with the terms used to exempt similar functions of other agencies under the FOI Act.

However, the Committee also notes that the FOI Act already contains a number of provisions which are likely to exempt sensitive information gathered by the Department in the exercise of its complaint handling and investigative functions.

The Committee notes that, on its face, the exemption of "complaint handling and investigative functions conferred by or under any Act" appears to be quite broad, but understands that it is your intention that the exemption will relate only to complaints and investigations relating to pecuniary interest matters or complaints and investigations in relation to acts of misbehaviour or maladministration.

Therefore, the Committee seeks your advice as to the full scope of the exemption provided for in the Bill and whether the Bill's objects could be achieved by a more limited exemption.

Yours sincerely



Peter Primrose MLC  
Chairman



New South Wales

The Hon. Kerry Hickey MP  
Minister for Local Government

Ref: 05/3928  
MIN: A21259  
Doc ID:

The Hon P T Primrose MLC  
Chairman  
Legislation Review Committee  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

- 5 SEP 2005

Dear Mr <sup>Peter</sup> Primrose

I refer to your letter of 20 June 2005 to the former Minister for Local Government (your reference LRC1292) concerning the Local Government Amendment Bill 2005 (now the *Local Government Amendment Act 2005*) and the limited exemption for the Department of Local Government from the provisions of the *Freedom of Information Act 1989*.

I note and agree with the Committee's views on the importance of freedom of information as a means of accountability. The decision to seek a limited exemption was taken with due regard to the importance of freedom of information. However, as your letter acknowledges, there are a number of situations where this legislation must seek a balance between rights of access and the potential harm such access could cause, having regard to the public interest.

The exemption is a relatively limited form of exemption. Essentially, under the *Local Government Act 1993*, the Director General of the Department of Local Government has a limited number of statutory complaints handling and investigation roles:

1. Under Chapter 14 of the Act, the Director General can receive **complaints** alleging breaches of the pecuniary interest provisions of the Act, and **investigate** or cause complaints of such breaches to be investigated.
2. Also under Chapter 14, the Director General can authorise an **investigation** into matters involving possible misbehaviour on the part of a councillor.
3. Under section 429A of the Local Act, a public official can make a **complaint** to the Director General in respect of the conduct of a council or an officer of a council.
4. Under section 430, the Director General may authorise an **investigation** into any aspect of a council or of its works and activities.

These are the relevant powers previously noted covering complaints and investigations relating to pecuniary interest, misbehaviour and, in limited circumstances, maladministration.

I do not consider the amending Act's objects could be achieved by a more limited exemption. As previously noted, the amendment is in line with exemptions granted to other agencies carrying out complaints handling and investigative functions, including the:

- Auditor General
- Independent Commission Against Corruption
- Office of the Ombudsman
- Office of the Legal Services Commissioner
- Health Care Complaints Commission
- Police Integrity Commission
- Independent Pricing and Regulatory Tribunal
- State Contracts Control Board

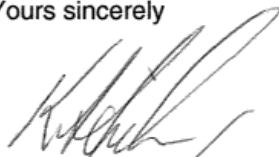
An alternative approach might have been to consider a generic exemption for complaints and investigations related material. However, such an exemption would have had a much more significant impact on access rights. I presume that concerns about the impact of a generic exemption have resulted in the approach of granting agency specific exemptions in the past.

I note that the Department will remain accountable, through the Minister for Local Government in Parliament, and it will remain subject to judicial review of its actions in carrying out and reporting on investigations. The Department is also subject to oversight by the NSW Ombudsman, the Independent Commission Against Corruption and the NSW Audit Office.

Further, I am advised that the Department's policy is that "any reasonable request for documents held by the Department will be favourably considered and that, where possible, access will be granted informally and free of charge."

I trust this clarifies the matter for the Committee.

Yours sincerely



Kerry Hickey MP  
**Minister**

## 14. PHOTO CARD BILL 2004

### Background

1. The Committee reported on the *Photo Card Bill 2004* in *Legislation Review Digest* No. 1 of 2005.
2. On 17 February 2005, the Committee wrote to the Minister for Roads requesting advice on the reasons for commencing the Act by proclamation.

### The Minister's reply

3. The Minister advised the Committee by letter dated 30 June 2005 that:  
... the reason for commencing this Bill on proclamation rather than assent is to allow time for development of supporting regulations that will contain machinery provisions.  
The Roads and Traffic Authority has undertaken to implement the NSW Photo Card as soon as possible.  
Subject to the regulations and administrative machinery being in place, the commencement date of the Act is expected to be in the third quarter of this year.

### The Committee's response

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



PARLIAMENT OF NEW SOUTH WALES  
LEGISLATION REVIEW COMMITTEE

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17 February 2005

Our Ref: LRC1095

The Hon Michael Costa MLC  
Minister for Roads  
Level 31 Governor Macquarie Tower  
1 Farrer Place  
Sydney NSW 2000

Dear Minister

**Photo Card 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 1 of 2005*.

The Committee notes that this Bill provides that the ensuing Act is to commence on a day or days to be appointed by proclamation.

The Committee seeks your advice as to the reasons for commencing this Bill by proclamation, and a likely commencement date of the Act.

Yours sincerely

A handwritten signature in cursive script that reads 'Peter Primrose'.

Peter Primrose MLC  
Chairman





*Minister for Roads  
Minister for Economic Reform  
Minister for Ports  
Minister for the Hunter*

**RECEIVED**

04 JUL 2005

LEGISLATION REVIEW  
COMMITTEE

M05/4751

Mr Peter Primrose MLC  
Chairman  
Legislation Review Committee  
Parliament of New South Wales  
Macquarie Street  
SYDNEY NSW 2000

30 JUN 2005

Dear Mr Primrose

Thank you for your letter on behalf of the Legislation Review Committee regarding the *Photo Card Bill 2004*.

I'm advised the reason for commencing this Bill on proclamation rather than assent is to allow time for development of supporting regulations that will contain machinery provisions.

The Roads and Traffic Authority has undertaken to implement the NSW Photo Card as soon as possible.

Subject to the regulations and administrative machinery being in place, the commencement date of the Act is expected to be in the third quarter of this year.

If you wish to discuss this further please contact Alison Scown in my office on 9228 5665.

Yours sincerely

**MICHAEL COSTA**

## Part Two – Regulations

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

| Regulation   | Gazette reference |      | Information sought   | Response Received |
|--|-------------------|------|----------------------|-------------------|
|  | Date              | Page |                      |                   |
| Adoption Amendment (Adoption Service Providers) Regulation 2005  | 01/07/05          | 3312 | 12/09/05             |                   |
| Centennial Park and Moore Park Trust Regulation 2004   | 27/08/04          | 6699 | 05/11/04<br>29/04/05 | 21/04/05          |
| Companion Animals Amendment (Penalty Notices) Regulation 2005  | 19/08/05          | 4579 | 12/09/05             |                   |
| Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Regulation 2005 | 29/07/05          | 4033 | 12/09/05             |                   |
| Hunter-Central Rivers Catchment Management Authority Regulation 2005                                       | 13/05/05          | 1663 | 20/06/05             |                   |
| Legal Profession Amendment (Advertising) Regulation 2005   | 15/06/05          | 2279 | 12/09/05             |                   |
| Stock Diseases General (Amendment) Regulation 2005   | 30/06/05          | 3277 | 12/09/05             |                   |
| Workers Compensation Amendment (Advertising) Regulation 2005   | 15/06/05          | 2288 | 12/09/05             |                   |

**SECTION B: COPIES OF CORRESPONDENCE ON REGULATIONS**

| Regulation & Correspondence   | Gazette ref           |
|---|-----------------------|
| Mental Health Amendment (Transfer of Queensland Civil Patients) Regulation 2005 <ul style="list-style-type: none"> <li>• Letter dated 29/04/05 from the Committee to the Minister for Health</li> <li>• Letter dated 11/07/05 from the Parliamentary Secretary of Health to the Committee</li> </ul>              | 08/04/05<br>page 1245 |
| Protection of the Environment Operations (General) Amendment (Luna Park) Regulation 2005 <ul style="list-style-type: none"> <li>• Letter dated 29/04/05 from the Committee to the Minister for the Environment</li> <li>• Letter dated 10/08/05 from the Minister for the Environment to the Committee</li> </ul> | 11/03/05<br>page 698  |
| Road Transport (General) Amendment (Driver Licence Appeals) Regulation 2005 <ul style="list-style-type: none"> <li>• Letter dated 01/04/05 from the Committee to the Minister for Roads</li> <li>• Letter dated 12/07/05 from the Minister for Roads to the Committee</li> </ul>                                  | 14/01/05<br>page 111  |

# 1. Mental Health Amendment (Transfer of Queensland Civil Patients) Regulation 2005



PARLIAMENT OF NEW SOUTH WALES  
LEGISLATION REVIEW COMMITTEE

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29 April 2005

Our Ref: LRC1222

The Hon Morris Iemma MP  
Minister for Health  
Level 30 Governor Macquarie Tower  
1 Farrer Place  
Sydney NSW 2000

Dear Minister

## **Mental Health Amendment (Transfer of Queensland Civil Patients) Regulation 2005**

On 29 April 2005, the Committee considered the above Regulation pursuant to s 9 of the *Legislation Review Act 1987*.

Previously, at its meeting of 26 June 2003, the Committee considered a similar regulatory amendment arising out of a comparable agreement entered into with Victoria (the Victorian Agreement).

The Committee noted then that the Victorian Agreement was not publicly available, despite it having legislative force and being able to convey functions on authorised officers. This is contrary to the principle that the law should be publicly accessible.

Considering it particularly important that laws relating to the involuntary detention of people should be publicly available, the Committee wrote to you:

- expressing the view that, since the regulation gives the Victorian civil agreement legislative force, that agreement should be publicly available; and
- noting that, while it was not subject to review by the Committee at that time, similar issues related to the Victorian Agreement of 19 August 2002 and the Queensland agreement of 23 April 2002.

As a result of the Committee's representations, the Victorian Agreement was placed on your Departmental website.

Similarly, in April 2004 the Committee considered an equivalent agreement with the ACT.

At that time your Department's Deputy Director, Legal & Legislative Services assured the Committee that the NSW-ACT agreement would be placed on the website as soon as the Department's website officer returned from leave.

However, an examination of your Departmental website reveals that, as at today's date, this has not been done.

The Committee strongly reiterates its view that, since the 2000 Regulation gives these various civil agreements legislative force, all of those agreements should immediately be made publicly available.

Yours sincerely

A handwritten signature in black ink that reads "Peter Primrose". The signature is written in a cursive style with a large initial 'P'.

Peter Primrose MLC  
Chairman

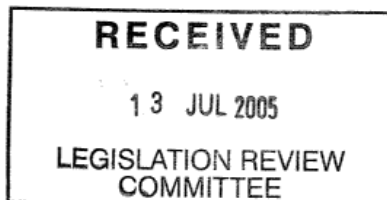


NEW SOUTH WALES

MINISTER FOR HEALTH

M05/3092

The Hon P Primrose MLC  
Chairman  
Legislative Review Committee  
Parliament of NSW  
Macquarie Street  
SYDNEY NSW 2000



11 JUL 2005

Dear Mr Primrose *Cherie*

I write in response to your letter of 29 April 2005 to the Minister for Health, the Hon Morris Iemma MP, concerning the publication of Cross-Border Mental Health Agreements, on the Department's website. The Minister has asked that I respond on his behalf.

I would like to apologise for the delay in publishing the NSW-ACT Agreement on the Department's website. I am advised that the existing Legal Branch website is currently being reviewed and will be replaced shortly. The Agreement will be available on the new website and in the interim the Agreement has been placed on the existing website.

In addition to the ACT Agreement, a further civil arrangement has also been entered into with Queensland. This is also available on the website.

Thank you for bringing your concerns to the Minister's attention. Should you have any questions, it is suggested that you contact Belinda Woolley, Legal Branch, on 9391-9610.

Yours sincerely

Cherie Burton MP  
Parliamentary Secretary for Health

## 2. Protection of the Environment Operations (General) Amendment (Luna Park) Regulation 2005



PARLIAMENT OF NEW SOUTH WALES  
COMMITTEE ON THE HEALTH CARE COMPLAINTS COMMISSION

29 April 2005

Our Ref:LRC  
Your Ref:

The Hon Bob Debus MP  
Minister for the Environment  
Level 36 Governor Macquarie Tower  
1 Farrer Place  
Sydney NSW 2000

Dear Minister

### **Protection of the Environment Operations (General) Amendment (Luna Park) Regulation 2005**

The Legislation Review Committee considered this regulation at its meeting today and resolved to write to you for advice in relation to certain matters.

The Committee is aware that the Regulation relieves the Park from the burden of responding to any actual or threatened legal action under the relevant part of the Act and that this may reduce its costs and help ensure its viability. However, by exempting Luna Park from noise pollution and noise abatement rules the Committee is concerned that the Regulation will have a significant and adverse impact on residents and others in the area.

It is unclear to the Committee whether there has been consultation with those affected by the noise from Luna Park, or whether consideration has been given to the impact of the noise on local residents and the quiet enjoyment of their homes.

The Committee is also concerned that the exemption for Luna Park may be contrary to some of the stated objects of the principal Act, namely:

- to provide increased opportunities for public involvement and participation in environment protection;
- to protect, restore and enhance the quality of the environment in NSW, having regard to the need to maintain ecologically sustainable development; and
- to rationalise, simplify and strengthen the regulatory framework for environment protection.

In light of these concerns, the Committee seeks your advice as to:

- (i) the details of the consideration given by you to the impact of the exemption on residents and others affected by noise from the Park; and
- (ii) whether any (and if so, which) alternative measures were considered to secure the viability of the Park without removing the protection from noise pollution under the Act.

Yours sincerely



Peter Primrose MLC  
Chairman



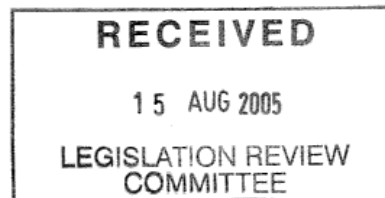


NEW SOUTH WALES

## MINISTER FOR THE ENVIRONMENT

In reply please quote: MOF19145  
Your Ref: LRC 1187

The Hon P T Primrose MLC  
Chairman, Legislation Review Committee  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000



10 AUG 2005

Dear Mr Primrose

Thank you for your letter dated 29 April 2005 requesting advice on the effect of the *Protection of the Environment Operations (General) Amendment (Luna Park) Regulation 2005*.

As required by the Subordinate Legislation Act a regulatory impact analysis was prepared in February 2005 which considered the costs and benefits associated with the proposed amendment and addressed your concerns as follows:

1. *Impact of the exemption on residents and others affected by noise from Luna Park*

There is no easy answer to the noise issues and land-use conflicts associated with Luna Park and the nearby residential premises. Attempting to achieve noise levels typically associated with suburban or urban areas is unrealistic as it would not provide sufficient scope for Luna Park to continue to operate as an amusement venue.

The Regulation was created in order to provide a holistic and streamlined environmental framework within which to regulate the activities carried out on site while ensuring the continued operation of Luna Park. The Regulation specifically exempts Luna Park from the noise provisions in the *Protection of the Environment Operations Act 1997* (POEO Act) but only to the extent to which the Park complies with its development consents.

The Legislation Review Committee's comments that the Regulation relieves Luna Park from the burden of responsibility with respect to legal action under the POEO Act, overstates the reach of the Regulation as it is not a complete exemption from the POEO Act. Protection is only afforded to Luna Park where it complies with the conditions of its development consent.

While the continued financial viability of Luna Park is important, the Regulation does not undermine these consent requirements. These consents contain noise control measures as determined by the Minister for Planning in 2002 and 2003, including specific noise control conditions and measures for external rides and amusements. The conditions contained in the development consents form the basis for noise management of Luna Park and the noise provisions in the POEO Act would apply where there is a breach of these consents. Note that there are no specific noise criteria in NSW for entertainment complexes.

The development consent conditions incorporate provisions for taking into account local residents, including a Noise Management Strategy developed by Hider Consulting in 2002. The Strategy provides for recording of complaints, checking that Park operations are not atypical, measuring noise levels against the table of noise levels derived from historical noise measurements and predicted noise levels, conducting audit measurements and annually reviewing the strategy.

The Regulation ensures that Luna Park will not be subject to noise constraints significantly beyond those specified by the Government in the development consents issued for the site, while also allowing Council to take action if consent conditions are not being met.

*2. Alternative measures considered*

Several options were considered as part of the regulatory impact analysis including the option of exempting Luna Park entirely from the operation of POEO Act without any limitation. It was decided that this was not appropriate and that protection from regulatory action should be limited to circumstances where Luna Park was complying with its development consents, as discussed above.

Yours sincerely



**Bob Debus**

### 3. Road Transport (General) Amendment (Driver Licence Appeals) Regulation 2005



PARLIAMENT OF NEW SOUTH WALES  
LEGISLATION REVIEW COMMITTEE

1 April 2005

Our Ref: LRC1141

The Hon Michael Costa MLC  
Minister for Roads  
Level 31, Governor Macquarie Tower  
1 Farrer Place  
Sydney NSW 2000

Dear Minister

#### **Road Transport (General) Amendment (Driver Licence Appeals) Regulation 2005**

The Legislation Review Committee considered the above Regulation at its meeting of 1 April 2005 and resolved to seek your advice on the issue of the appeal rights removed by the Regulation.

The Committee notes the full effect of this Regulation is not immediately apparent as it replaces general appeal rights with particular appeal rights in relation to a complex legislative scheme. The Committee, therefore, seeks your advice as to whether the Regulation removes any right to appeal a decision of the RTA apart from a decision under clause 18(2)(d) of the *Road Transport (Driver Licensing) Regulation 1999*.

In seeking clarification on this point, the Committee notes that the NSW Court of Appeal decision of *RTA v Wilson* (2003) 58 NSWLR 240 makes it clear that there is no right to appeal a decision where the RTA does not have any discretion in relation to the matter.

The Committee is also concerned at the lack of a right to appeal the imposition of a licence suspension in circumstances where an offender was not at fault. As the decision of *RTA v Hillyard* (2003) NSW CA 284 demonstrates, problems may arise when severe consequences automatically attach to strict liability offences and there is no discretion available to take into account the circumstances of the case. The Committee has also written to the Joint Standing Committee on Road Safety to draw attention to our concerns in this regard.

Yours sincerely

A handwritten signature in cursive script that reads 'Peter Primrose'.

Peter Primrose MLC  
Chairman



*Minister for Roads  
Minister for Economic Reform  
Minister for Ports  
Minister for the Hunter*

M05/2857

Mr Peter Primrose MLC  
Chairman  
Legislation Review Committee  
Parliament of New South Wales  
Macquarie Street  
SYDNEY NSW 2000

12 JUL 2005

Dear Mr Primrose

Thank you for your letter regarding the commencement of the *Road Transport (General) Amendment (Driver Licence Appeals) Regulation 2005*.

The purpose of the Regulation is to make it clear that there is no right of appeal against a licence suspension or a licence refusal, on the grounds of demerit points.

With respect to the Committee's concern about a lack of appeal rights where a person claims not to have been at fault for a specific offence, I point out that there is already ample opportunity for a person to contest the issue of an infringement notice either with the Infringement Processing Bureau, or by electing to have the matter heard at a Local Court.

As an alternative to serving the suspension period for exceeding the demerit point limit, a person may elect to serve a good behaviour period and continue driving. Licence holders are advised of this option on the suspension notice.

If you wish to discuss this further please contact Alison Scown in my office on 9228 5665.

Yours sincerely

A handwritten signature in black ink that reads "Michael Costa".

**MICHAEL COSTA**

# Appendix 1: Index of Bills Reported on in 2005

|  | Digest Number |
|--|---------------|
| Appropriation Bill 2005  | 7             |
| Appropriation (Budget Variations) Bill 2005  | 6             |
| Appropriation (Parliament) Bill 2005   | 7             |
| Appropriation (Special Offices) Bill 2005  | 7             |
| Brigalow and Nandewar Community Conservation Area Bill 2005  | 7             |
| Building Legislation Amendment (Smoke Alarms) Bill 2005  | 9             |
| Building Professionals Bill 2005   | 7             |
| Civil Liability Amendment (Food Donations) Bill 2004   | 1             |
| Civil Liability Amendment (Offender Damages) Bill 2005   | 2, 3          |
| Civil Procedure Bill 2005  | 5             |
| Classification (Publications, Films and Computer Games) Enforcement Amendment (X 18+ Films) Bill 2005* | 3             |
| Coal Acquisition Amendment (Fair Compensation) Bill 2005   | 5             |
| Courts Legislation Amendment Bill 2005   | 7             |
| Court Security Bill 2005   | 2             |
| Crimes Amendment (Grievous Bodily Harm) Bill 2005  | 3             |
| Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005                            | 6             |
| Criminal Appeal Amendment (Jury Verdicts) Bill 2004*   | 3             |
| Criminal Assets Recovery Amendment Bill 2005   | 7             |
| Criminal Procedure Amendment (Evidence) Bill 2005  | 3             |
| Criminal Procedure Further Amendment (Evidence) Bill 2005  | 4             |
| Crown Lands Amendment (Access to Property) Bill 2005*  | 4             |
| Crown Lands Legislation Amendment Bill 2005  | 7             |
| Drug Misuse and Trafficking Amendment Bill 2005  | 8             |
| Dust Diseases Tribunal Amendment (Claims Resolution) Bill 2005   | 6             |
| Duties Amendment (Abolition of Bob Carr's Vendor Duty) Bill 2005*                                      | 9             |
| Electricity Supply Amendment Bill 2005   | 2, 5          |
| Energy Administration Amendment (Water and Energy Savings) Bill 2005                                   | 5             |
| Environmental Planning and Assessment Amendment (Development Contributions) Bill 2004                  | 1             |
| Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005   | 7             |
| Fair Trading Amendment (Responsible Credit) Bill 2005*   | 6             |
| Fire Brigades Amendment (Community Fire Units) Bill 2005   | 7             |

|   | Digest Number |
|---|---------------|
| Fiscal Responsibility Bill 2005   | 7             |
| Fisheries Management Amendment (Catch History) Bill 2005*                                       | 6             |
| Gambling (Two-up) Amendment Bill 2005   | 7             |
| Game and Feral Animal Control Amendment Bill 2005   | 5             |
| Gaming Machines Amendment Bill 2005   | 8             |
| Independent Commission Against Corruption Amendment Bill 2005                                   | 2, 3          |
| James Hardie Former Subsidiaries (Special Provisions) Bill 2005                                 | 9             |
| Law Enforcement (Powers and Responsibilities) Amendment (In-Car Video Systems) Bill 2004        | 1             |
| Legal Profession Amendment Bill 2005  | 8             |
| Legal Profession Bill 2004  | 1, 5          |
| Legislation Review Amendment (Family Impact) Bill 2005*   | 9             |
| Local Government Amendment Bill 2005  | 8             |
| Local Government and Valuation of Land Amendment (Water Rights) Bill 2005                       | 9             |
| Marine Safety Amendment (Random Breath Testing) Bill 2004                                       | 1             |
| National Park Estate (Reservations) Bill 2005   | 7             |
| National Parks and Wildlife (Adjustment of Areas) Bill 2005                                     | 3             |
| National Parks and Wildlife (Further Adjustment of Areas) Bill 2005                             | 9             |
| Occupational Health and Safety Amendment (Workplace Deaths) Bill 2005                           | 7             |
| Parliamentary Electorates and Elections Amendment (Voting Age) Bill 2005*                       | 9             |
| Passenger Transport Amendment (Maintenance of Bus Services) Bill 2005                           | 8             |
| Pawnbrokers and Second-hand Dealers Amendment Bill 2005   | 8             |
| Petroleum (Submerged Lands) Amendment (Permits and Leases) Bill 2005                            | 7             |
| Photo Card Bill 2004  | 1             |
| Police Integrity Commission Amendment (Shaw Investigation) Bill 2005*                           | 2             |
| Poultry Meat Industry Amendment (Prevention of National Competition Policy Penalties) Bill 2005 | 7             |
| Prisoners (Interstate Transfer) Amendment Bill 2005   | 4, 5          |
| Protection of Agricultural Production (Right to Farm) Bill 2005*                                | 4             |
| Road Transport (General) Bill 2004  | 1, 4          |
| Road Transport Legislation (Speed Limiters) Amendment Bill 2004                                 | 1, 4, 7       |
| Rural Workers Accommodation Amendment Bill 2005   | 7             |
| Security Industry Amendment Bill 2005   | 9             |
| Sheriff Bill 2005   | 2             |
| Smoke-free Environment Amendment (Motor Vehicle Prohibition) Bill 2005*                         | 9             |

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|   | Digest Number |
|---|---------------|
| Special Commission of Inquiry (James Hardie Records) Amendment Bill 2004                              | 1             |
| Standard Time Amendment (Co-ordinated Universal Time) Bill 2005                                       | 2             |
| State Revenue Legislation Amendment Bill 2005   | 8             |
| State Revenue Legislation Amendment (Budget Measures) Bill 2005                                       | 7             |
| Statute Law Miscellaneous Provisions Bill 2005  | 8             |
| Surveying Amendment Bill 2005   | 7             |
| Sydney 2009 World Masters Games Organising Committee Bill 2005  | 7             |
| Sydney University Settlement Incorporation Amendment Bill 2005*                                       | 7             |
| Terrorism Legislation Amendment (Warrants) Bill 2005  | 8             |
| Transport Administration Amendment (Transport Levy For Major Events) Bill 2005                        | 2             |
| Transport Legislation Amendment (Implementation of Waterfall Rail Inquiry Recommendations) Bill 2005* | 2             |
| Transport Legislation Amendment (Waterfall Rail Inquiry Recommendations) Bill 2005                    | 7             |
| Water Efficiency Labelling and Standards (New South Wales) Bill 2005                                  | 3             |
| Workplace Surveillance Bill 2005  | 6             |

## Appendix 2: Index of Ministerial Correspondence on Bills for 2005

| <b>Bill</b>  | <b>Minister/Member</b>   | <b>Letter sent</b>   | <b>Reply</b>         | <b>Digest 2004</b> | <b>Digest 2005</b> |
|--|--|----------------------|----------------------|--------------------|--------------------|
| Building Professionals Bill 2005   | Minister for Infrastructure and Planning (Planning Administration) | 03/06/05             | 22/06/05             |                    | 7, 9               |
| Child Protection (Offender Prohibition Orders) Bill 2004   | Minister for Police  | 18/06/04             |                      | 6                  |                    |
| Civil Liability Amendment (Offender Damages) Bill 2005   | Minister for Justice   | 01/03/05             | 08/03/05             |                    | 2, 3, 5            |
| Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005                          | Attorney General   | 23/05/05             |                      |                    | 6                  |
| Criminal Procedure Further Amendment (Evidence) Bill 2005  | Attorney General   | 01/05/05             | 21/06/05             |                    | 4, 9               |
| Electricity Supply Amendment Bill 2005   | Minister for Energy and Utilities                                  | 01/03/05             | 30/03/05             |                    | 2, 5               |
| Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005 | Minister for Infrastructure and Planning                           | 03/06/05             | 24/06/05             |                    | 7, 9               |
| Gaming Machines Amendment Bill 2005  | Minister for Gaming and Racing                                     | 20/06/05             |                      |                    | 8                  |
| Independent Commission Against Corruption Amendment Bill 2005  | Premier  | 01/03/05             | 02/03/05             |                    | 2, 3               |
| Legal Profession Amendment Bill 2005   |  |                      |                      |                    | 8                  |
| Legal Profession Bill 2004   | Attorney General   | 17/02/05             | 07/04/05             |                    | 1, 5               |
| Licensing And Registration (Uniform Procedures) Amendment (Photo ID) Bill 2004                       | Minister for Commerce  | 03/12/04             | 09/12/04             | 17                 | 1                  |
| Local Government Amendment Bill 2005   | Minister for Local Government                                      | 20/06/05             | 05/09/05             |                    | 8, 9               |
| Marine Safety Amendment (Random Breath Testing) Bill 2004  | Minister for Ports   | 17/02/05             |                      |                    | 1                  |
| Photo Card Bill 2004   | Minister for Roads   | 17/02/05             | 30/06/05             |                    | 1, 9               |
| Prisoners (Interstate Transfer) Amendment Bill 2005  | Minister for Justice   | 01/04/05             | 18/04/05             |                    | 4, 5               |
| Road Transport (General) Bill 2004   | Minister for Roads   | 17/02/05             | 14/03/05             |                    | 1, 4               |
| Road Transport (General) Amendment (Licence Suspension) Bill 2004                                    | Minister for Roads   | 18/06/04             | 01/12/04             | 9                  | 1, 5               |
| Road Transport Legislation (Speed Limiters) Amendment Bill 2004                                      | Minister for Roads   | 17/02/05<br>01/04/05 | 14/03/05<br>23/05/05 |                    | 1, 4, 7            |
| Security Industry Amendment Bill 2005  | Minister for Police  | 12/09/05             |                      |                    | 9                  |



| <b>Bill</b>                                   | <b>Minister/Member</b> | <b>Letter sent</b> | <b>Reply</b> | <b>Digest 2004</b> | <b>Digest 2005</b> |
|---|------------------------|--------------------|--------------|--------------------|--------------------|
| Smoke-free Environment Amendment Bill 2004    | Minister for Health    | 05/11/04           |              | 15                 |                    |
| State Revenue Legislation Amendment Bill 2005 | Treasurer              | 20/06/05           |              |                    | 8                  |

## Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2005

|  | (i)<br>Trespasses<br>on rights | (ii)<br>insufficiently<br>defined<br>powers | (iii)<br>non<br>reviewable<br>decisions | (iv)<br>delegates<br>powers | (v)<br>parliamentary<br>scrutiny |
|--|--------------------------------|---|---|-----------------------------|----------------------------------|
| Building Professionals Bill 2005   | N, C                           |   |   |                             |                                  |
| Civil Liability Amendment (Food Donations) Bill 2004   | N                              |   |   | N                           |                                  |
| Civil Liability Amendment (Offender Damages) Bill 2005   | N,C                            |   |   |                             |                                  |
| Civil Procedure Bill 2005  | N                              |   |   | N                           |                                  |
| Classification (Publications, Films and Computer Games) Enforcement Amendment (X 18+ Films) Bill 2005* | R                              |   |   |                             |                                  |
| Court Security Bill 2005   |                                |   |   | N                           |                                  |
| Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005                            | R, C                           |   | R                                       |                             |                                  |
| Criminal Appeal Amendment (Jury Verdicts) Bill 2004*   | R                              |   |   |                             |                                  |
| Criminal Assets Recovery Amendment Bill 2005   | R                              |   |   |                             |                                  |
| Criminal Procedure Amendment (Evidence) Bill 2005  | N                              |   |   |                             |                                  |
| Criminal Procedure Further Amendment (Evidence) Bill 2005  | C                              |   |   | N                           |                                  |
| Drug Misuse and Trafficking Amendment Bill 2005  |                                |   |   | N                           |                                  |
| Dust Diseases Tribunal Amendment (Claims Resolution) Bill 2005   |                                |   |   | N                           |                                  |
| Electricity Supply Amendment Bill 2005   |                                |   |   | C                           |                                  |
| Energy Administration Amendment (Water and Energy Savings) Bill 2005                                   |                                |   |   | R, N                        |                                  |
| Environmental Planning and Assessment Amendment (Development Contributions) Bill 2004                  |                                |   | N                                       | N                           | N                                |
| Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005   | N, R                           | C   | N, C                                    |                             | R, C                             |
| Gaming Machines Amendment Bill 2005  | C                              |   |   |                             |                                  |

|  | (i)<br>Trespasses<br>on rights | (ii)<br>insufficiently<br>defined<br>powers | (iii)<br>non<br>reviewable<br>decisions | (iv)<br>delegates<br>powers | (v)<br>parliamentary<br>scrutiny |
|--|--------------------------------|---|---|-----------------------------|----------------------------------|
| Independent Commission Against Corruption Amendment Bill 2005                            |                                |   |   | C                           |                                  |
| Law Enforcement (Powers and Responsibilities) Amendment (In-Car Video Systems) Bill 2004 | R                              |   |   | N                           |                                  |
| Legal Profession Amendment Bill 2005   | N                              |   |   | R                           |                                  |
| Legal Profession Bill 2004   | N,C                            |   |   | N                           |                                  |
| Local Government Amendment Bill 2005   | C, R                           |   |   |                             |                                  |
| Marine Safety Amendment (Random Breath Testing) Bill 2004                                |                                |   |   | C                           |                                  |
| National Parks and Wildlife (Adjustment of Areas) Bill 2005                              |                                |   |   | N                           |                                  |
| Parliamentary Electorates and Elections Amendment (Voting Age) Bill 2005*                | R                              |   |   |                             |                                  |
| Passenger Transport Amendment (Maintenance of Bus Services) Bill 2005                    | R                              | R   | R                                       | R                           |                                  |
| Photo Card Bill 2004   |                                |   |   | C                           |                                  |
| Police Integrity Commission Amendment (Shaw Investigation) Bill 2005*                    | N                              |   |   |                             |                                  |
| Prisoners (Interstate Transfer) Amendment Bill 2005                                      |                                |   |   | C                           |                                  |
| Protection of Agricultural Production (Right to Farm) Bill 2005*                         | R                              |   |   |                             |                                  |
| Road Transport (General) Bill 2004   | N                              | C   |   | C                           |                                  |
| Road Transport Legislation (Speed Limiters) Amendment Bill 2004                          | N                              |   |   | C                           |                                  |
| Rural Workers Accommodation Amendment Bill 2005  | R                              |   |   |                             |                                  |
| Security Industry Amendment Bill 2005  | C,R                            |   |   |                             |                                  |
| Sheriff Bill 2005  |                                |   |   | N                           |                                  |
| Special Commission of Inquiry (James Hardie Records) Amendment Bill 2004                 | R, N                           |   |   |                             |                                  |
| State Revenue Legislation Amendment Bill 2005  | N, C, R                        |   |   |                             |                                  |

Legislation Review Committee

|  | (i)<br>Trespasses<br>on rights | (ii)<br>insufficiently<br>defined<br>powers | (iii)<br>non<br>reviewable<br>decisions | (iv)<br>delegates<br>powers | (v)<br>parliamentary<br>scrutiny |
|--|--------------------------------|---|---|-----------------------------|----------------------------------|
| State Revenue Legislation Amendment (Budget Measures) Bill 2005      | N                              |   |   |                             |                                  |
| Surveying Amendment Bill 2005  | N                              |   |   |                             |                                  |
| Terrorism Legislation Amendment (Warrants) Bill 2005                 | R                              |   |   |                             |                                  |
| Water Efficiency Labelling and Standards (New South Wales) Bill 2005 | N                              |   |   | N                           | N                                |

**Key**

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

## Appendix 4: Index of correspondence on regulations reported on in 2005

| <b>Regulation</b>  | <b>Minister/Correspondent</b>                 | <b>Letter sent</b>   | <b>Reply</b> | <b>Digest 2005</b> |
|--|---|----------------------|--------------|--------------------|
| Architects Regulation 2004   | Minister for Commerce                         | 21/09/04             | 30/11/04     | 1                  |
| Centennial and Moore Park Trust Regulation 2004  | Minister for Tourism and Sport and Recreation | 05/11/04<br>29/04/05 | 21/04/05     | 5                  |
| Environmental Planning and Assessment Amendment (ARTC Rail Infrastructure) Regulation 2004 | Minister for Infrastructure and Planning      | 26/10/04<br>17/02/05 | 01/02/05     | 1                  |
| Forestry Regulation 2004   | Minister for Primary Industries               | 26/10/04<br>17/02/05 | 18/01/05     | 1                  |
| Institute of Teachers Regulation   | Minister for Education and Training           | 01/04/05<br>03/06/05 | 26/05/05     | 7                  |
| Mental Health Amendment (Transfer of Queensland Civil Patients) Regulation 2005            | Minister for Health                           | 29/04/05             | 11/07/05     | 9                  |
| Occupational Health and Safety Amendment (Transitional) Regulation 2004                    | Minister for Commerce                         | 01/04/05<br>23/05/05 | 17/05/05     | 6                  |
| Passenger Transport (Drug and Alcohol Testing) Regulation 2004                             | Minister for Transport Services               | 30/04/04<br>01/03/05 | 17/02/05     | 2                  |
| Protection of the Environment Operations (Luna Park) Regulation 2005                       | Minister for the Environment                  | 29/04/05             | 10/08/05     | 9                  |
| Road Transport (General) Amendment (Driver Licence Appeals) Regulation 2005                | Minister for Roads                            | 01/04/05             | 12/07/05     | 9                  |
| Stock Diseases (General) Regulation 2004   | Minister for Primary Industries               | 05/11/04             | 16/12/04     | 1                  |
| Sydney Olympic Park Amendment Regulation 2004  | Minister for Sport and Recreation             | 05/11/04             | 03/12/04     | 1                  |